

March 21, 2011

By FedEx and Email

Ms. Debra A. Howland, Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429



Re: FairPoint Communications Performance Assurance Plan Audit and related dockets (DT 09-059; DT 09-113 & DT 09-206) – Response to FairPoint’s March 4, 2011 Letter

Dear Ms. Howland:

The Commission’s decision to require an audit of FairPoint’s performance and results under the Performance Assurance Plan (PAP) is correct and entirely justified. FairPoint’s letter of March 4th provides no legal basis or factual reason to reconsider that decision. Instead, the Commission should proceed directly to a thorough and complete audit of FairPoint’s PAP.

FairPoint’s letter continues a pattern that by now is familiar. It continues to claim that auditing the PAP is a waste of time and money because the Commission will soon do away with it in favor of whatever simplified proposal FairPoint puts forth. This claim is both premature and presumptuous. It prejudices what will be an important and complex decision-making process on the part of the Commission and assumes a foregone conclusion.

It is not the PAP itself or the CLECs that are the issue; it is a FairPoint performance problem. As we have pointed out before, FairPoint was able to operate with only nominal PAP credits from closing until cutover, April 2008 through January 2009. However, due to wholesale service quality problems that began in February 2009 and which have yet to be adequately addressed, its PAP credit obligations increased significantly and have remained at high levels since that time. FairPoint could lower those penalty amounts to pre-cutover amounts if it were to remedy the underlying wholesale service quality problems. Unfortunately, that has not happened to date despite FairPoint’s self-touted CDIP initiatives, which have failed to cure the problems. PAP credits remain at many times pre-cutover levels and once again are on the rise. (See the attached chart.) Now, instead of focusing the underlying wholesale service issues causing it to pay PAP credits, FairPoint seeks to reprogram the test so that it will no longer fail.

Serious concerns have been raised regarding the integrity of FairPoint’s data and FairPoint’s ability to collect and manipulate those data. These issues go to the heart of FairPoint’s systems and reporting (past, current, and future), regardless of whether the PAP remains as is, evolves, or takes on some other form. These red flags provide ample reason to look first at FairPoint’s ability to collect and report data accurately to the Commission and wholesale customers. Again, the Commission should proceed with the audit as ordered.

FairPoint’s letter raises several additional points to which the Signatories wish to respond.

Reconsideration. FairPoint's request that the Commission reconsider its decision to require the audit fails for multiple reasons. First, under the Commission's Orders in DT 01-006 and DT 07-011, the Commission need not hold any hearing or provide FairPoint any opportunity to be heard before requiring an audit. *In re Verizon New Hampshire — Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assurance Plan*, DT 01-006, Order Regarding Metrics and Plan, Order No. 23, 940 (March 29, 2002); *In re Verizon New England et. al. — Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823 (Feb. 25, 2008). Pursuant to the terms of the PAP itself, the Commission may audit the plan. Such audits may be as frequent as *annually*. In such audits, "[a]ll aspects of the Plan . . . will be subject to review." PAP § II.K.1. Further, under § 9.4 of the negotiated settlement between FairPoint and the Commission Staff, which the Commission approved in Order No. 24,823:

FairPoint agrees to pay for the conduct of an independent audit of its wholesale performance assurance plan. . . . If no simplified plan is in effect by June 1, 2010, or if efforts to develop such a plan have terminated before that date, then FairPoint agrees to such an independent audit of the existing wholesale performance assurance plan.

The triggering event to which FairPoint agreed in 2008 — that no simplified PAP was in place by June 2010 — indisputably has occurred. There are no facts in that issue to be proved or disproved.

Second, it is plain that there is nothing new in FairPoint's "motion." FairPoint merely repeats the same contentions made in its previous letters. Throwing in a due process argument does not help it because there has been no due process violation. FairPoint has had, and has taken advantage of, multiple opportunities to state its views to the Commission. FairPoint filed at least two letters prior to the Commission's directive, on November 22 and December 22, 2010. FairPoint, its wholesale customers, and the Staff met and discussed PAP issues during January and February 2011. In short, to the extent that the Commission gives any credence to FairPoint's claim that it is due an "an opportunity to be heard," the Commission can and should find that such an opportunity has already been provided.

Finally, the Commission may grant rehearing and/or reconsideration if "good reason" exists to consider an order either *unlawful* or *unreasonable*. RSA 541:3, 541:4; *In re Investigation as to Whether Certain Calls Are Local*, DT 00-223, DT 00-054, Order Denying Verizon New Hampshire's Petition for Rehearing of Order Approving Agreements, Order No. 24,266, at 2 ((May 13, 2005). Given the Commission's Orders in DT 01-006 and 07-011 and the course of conduct over the past few months, the Commission decision to move forward with an audit could not be considered either unlawful or unreasonable.

Scope of Audit. The Commission should reject FairPoint's attempts to narrow the scope of the audit to the point of meaninglessness. Its suggestion to restrict the audit to only those metrics it sees fit to include in its vision of a future PAP should raise another red flag as to the seriousness with which FairPoint intends to approach its responsibilities.

The Commission should not allow FairPoint unilaterally to set the scope of the audit. A general Request for Proposal (RFP) should be developed with input from all stakeholders. However, the auditors should, as a first phase, have the responsibility to review FairPoint's overall control environment surrounding the PAP process to provide guidance on the scope of testing and review that may be needed.

All metrics, not just a restricted subset, should be considered. FairPoint is subject to the PAP in its entirety, not merely those metrics it chooses. Its compliance with all of its obligations should be assessed and reported to the Commission and stakeholders.

Further, it is essential that the audit seek and obtain CLEC data as a means of verifying the operation of the PAP. Relying solely on FairPoint's reported data presents the obvious problem of "garbage in, garbage out." Even if FairPoint's operation of the PAP yields the correct result based on the data provided, the results will be meaningless if FairPoint's data are faulty. Therefore, any audit should be required to compare FairPoint's data with that of one or more CLECs to ensure that FairPoint's and the CLECs' data are comparable.

Confidentiality of Information. Communication should be open, with limited confidentiality. The Signatories object to FairPoint's efforts to restrict access to relevant data, audit results and communications with the auditors, not just from CLECs but from Staff and the Commission itself. This Commission needs no reminder that New Hampshire laws regarding confidentiality have changed for telecommunications providers, who now must not only specifically request confidentiality, but must bear the burden of showing that the information the provider is seeking to protect, qualifies for such treatment under the provisions of RSA 91-A or other applicable law.

The Signatories believe that PAP measurements, methods, and aggregate penalty calculations are not confidential and do not merit confidential treatment.¹ We believe that communication should be open, without undue shielding. In the case of truly confidential, competitively sensitive data, Staff should still have complete access.

At a minimum, the Commission, its Staff, and any other oversight resources that the Commission thinks appropriate must have full access to the data and the auditors. FairPoint's attempts to keep the process in the back room and out of the light should be another red flag regarding FairPoint's approach to this obligation.

¹ As is the practice today, individual CLEC's data, including their individual PAP credit calculations, should remain confidential from the parties but would be available to the auditors and Staff.

Selection of Auditor. In addition to being technically competent, a requisite for any auditor that the Commission selects is that it should be free from any taint of interest or bias. In this light, the Signatories wish to point out the very substantial fees earned by certain accounting and audit firms in connection with FairPoint's recent Chapter 11 proceeding. According to Bankruptcy Court filings, Ernst & Young provided tax and audit services to FairPoint, and is requesting fees of \$9,302,678.59 and \$245,884.67 in expenses.² KPMG, one of the auditors that FairPoint recommended, provided fresh start accounting services to FairPoint, requesting fees of \$1,397,523.95 and expenses of \$80,214.50 for less than eleven months' work from March 4, 2010 through January 24, 2011.³

FairPoint's swift dismissal of Liberty Consulting as a candidate should raise additional red flags. That Liberty is already conducting an audit of the retail side argues in its favor, not against it. The Commission at this point should be able to assess Liberty's qualifications and competence to conduct the audit. Further, Liberty's ability to understand FairPoint's systems may make it more expert and efficient in conducting an audit on the wholesale side, especially with respect to issues regarding parity PAP metrics that compare retail and wholesale operations.

Stays of Other Proceedings. The Commission's stays of other PAP-related dockets are appropriate. The audit is necessary to develop a baseline understanding of the existing PAP and FairPoint's ability and willingness to comply with the obligations it accepted at the time it assumed operations in New Hampshire and under any future PAP. Moving forward with other proceedings will complicate matters and draw resources from the audit process. The Commission should however require FairPoint to continue to provide bill credits as required and determined under the existing PAP and provide stability for CLECs by ensuring all parties that the dollars-at-risk waivers filed by FairPoint in DT 09-113, if approved, will not be retroactive.

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After two years, FairPoint has not shown that it can properly collect data and operate a performance plan, and it has demonstrated in a series of meetings that it does not have an understanding of how what it is measuring relates to the service it is providing to CLECs or how to use the data from those metrics to improve its performance. An open, transparent, full audit will provide the Commission and parties a better baseline to make appropriate decisions on FairPoint's ability to meet its past commitment in this area as well as assessing the path forward for developing a new PAP, if the Commission believes it justified. It may have the added benefit of educating FairPoint further as to how it can use the PAP to improve its wholesale customer service and avoid future penalties – a result that will benefit all parties.

²http://docs.bmcgroup.com/FairPoint/docs/nysb_1-09-bk-16335_2216_0.pdf.

³http://docs.bmcgroup.com/FairPoint/docs/nysb_1-09-bk-16335_2217.pdf.

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The Signatories appreciate the Commission's continuing attention to this important issue and would also like to note that several dockets regarding the PAP have been opened. It may be appropriate to consolidate all the dockets to ease administration.

Respectfully submitted,

Freedom Ring Communications, LLC, d/b/a
BayRing Communications

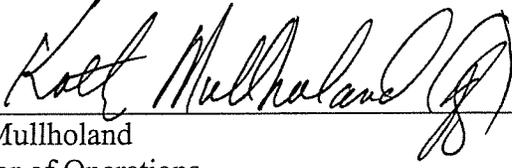
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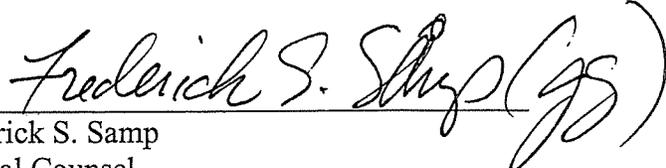
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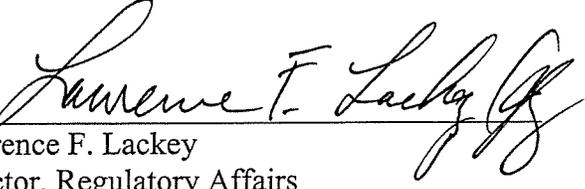
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