State of New Hampshire
Public Utilities Commission

DRM 12-036 Rulemaking
Puc 400 Rules for Telephone Service
Draft Final Proposal
Notice Number 2013-51
Dated October 3, 2013

Supplemental Comments
Submitted By
New Hampshire Legal Assistance
On Behalf Of The Way Home
November 7, 2013

A. The Draft Rules Concerning "Basic Service" in Part Puc 410 Are Well Within the Commission's Jurisdiction.

The New Hampshire Telephone Association (NHTA) raised issues at the October 29, 2013 rulemaking hearing concerning draft Puc 410.03, Puc 410.04 and Puc 410.05. NHTA points to the telecommunications amendment to HB 542, which became law on July 29, 2013 without signature from the Governor. The Way Home writes in response to the NHTA.

NHTA argued at the October 29, 2013 rulemaking hearing that – as a result of the telecommunications amendment to HB 542 in 2013 – end users can only complain to the Commission about whether basic service has been discontinued on a wide scale, or whether the rate cap provision for basic service had been violated (citing RSA 374:22-p, VIII(a) and RSA 374:22-p, VIII(b) respectively). This argument fails because the legislature did not alter the last sentence of RSA 365:1-a to confine complaints regarding basic service to only these two specific statutory provisions.

The legislature could have revised the last sentence of RSA 365:1-a to confine complaints regarding basic service to only these statutory provisions, but it did not, and we simply cannot "...add words which the lawmakers did not see fit to include." In re Garrison Place Real Estate Inv. Trust, 159 N.H. 539, 542 (2009). As a consequence, any discussion concerning the construction of the word "discontinue" in RSA 374:22-p, VIII(a) is irrelevant, as the legislature never confined basic service complaints in the last sentence of RSA 365:1-a to the two provisions in RSA 374:22-p, VIII.

"When a statute's language is plain and unambiguous, we need not look beyond [it] for further indications of legislative intent." In re Garrison Place, at 542. Even if there had been a public hearing on the telecommunications amendment attached to HB 542 in 2013, that testimony or any other discussions could not be used to construe the plain language. The canon of statutory construction requiring a reliance on the plain language of the statute is particularly important in this context, as some of the perceived intention of the legislation has not always matched the actual plain language of the statutes passed.

The plain language of the telecommunications amendment to HB 542 altered slightly the ability of end-users to complain about "basic service," as expressly preserved by the legislature in the last sentence RSA 365:1-a. Specifically, the plain language of the telecommunications amendment to HB 542 deleted three (3) words from the last sentence of RSA 365:1-a: "however" and the phrase "provision of." The deletion of the phrase "provision of" certainly curtails some of the ability of end users to complain about "basic service" and, as a consequence, the Commission staff responded by eliminating multiple draft "basic service" rules.

The legislature also added the phrase "as defined by RSA 374:22-p, I(b) by excepted local exchange carriers" at the end of the last sentence of RSA 365:1-a. The plain language of this added phrase clarifies and reinforces that the only service that end users can complain about is "basic service."

The plain language of the telecommunications amendment to HB 542 also clarified and narrowed the definition of "basic service" by adding the phrase "or feature" to RSA 374:22-p, I (c). The plain language of the telecommunications amendment to HB 542 also made clear that the Commission shall not regulate "[a]ny combination of basic service along with any other service or feature" by adding the phrase "and shall not be regulated by the commission" to end of the sentence in RSA 374:22-p, I(c). As a result of these two changes to the sentence in RSA 374:22-p, I(c), any bundle that includes "basic service" which has a "feature" beyond those features specifically enumerated within the definition of "basic service" in RSA 374:22-p, I(b) is not to be regulated.

The revisions to the last sentence of RSA 365:1-a and the last sentence in RSA 374:22-p, I(c) did not narrow the group of "who" can complain about "basic service." The plain language in RSA 347:22-p, I(b) & (c) define services as either "basic service" or "nonbasic service." The term "basic service customer" simply does not exist in the plain language of this statute, nor any statute that the undersigned can locate. The notion that the legislature created two classes customers – "basic service customers" and "nonbasic service customers" – is simply not supported in the plain language. The plain language of the statutes apply to "end users."

And RSA 365:1-a still provides that: "Such end users may make complaints to the commission regarding basic service, as defined by RSA 374:22-p, I (b) by excepted local exchange carriers." (emphasis added). The phrase "[s]uch end users" continues to answer the question of "who" can complain about the service of "basic service." The legislature could have narrowed this group to "end users using only basic service," but it did not, and we simply cannot "...add words which the lawmakers did not see fit to include." In re Garrison Place, at 542. Draft Puc 410.03, Puc 410.04 and Puc 410.05 are more than supported by the language of the last sentence of RSA 365:1-a.

Moreover, the plain language of RSA 374:22-p, III continues to apply. The plain language of RSA 374:22-p, III contains a statutory mandate that: "The commission shall seek to ensure that affordable basic telephone services are available to consumers throughout all areas of the state at reasonably comparable rates." Draft Puc 410.03, Puc 410.04 and Puc 410.05 are consistent with the Commission's ongoing responsibility to ensure that affordable basic telephone services are available to consumers throughout the state. The legislature never eliminated this responsibility. To the contrary, through SB 48, the legislature expressly maintained the Commission's responsibility under RSA 374:22-p, III by enacting RSA 362:8, IV which provides for Commission authority over: "Such obligations that arise under RSA 374:22-p..." And the telecommunications amendment attached to HB 542 did not change RSA 362:8, IV.

Additionally, following the passage of the Telecommunications Act of 1996, which created a new section to the Communications Act of 1934 entitled "Universal Service" (see 47 USC § 254), it has been recognized and accepted that it is the responsibility of both the state and federal governments to preserve and advance universal service. See e.g. Bell Atlantic Mobile, Inc. v. Department of Public Utility Control, 253 Conn. 453, 465 (2000). That includes, inter alia, the requirement that: "The Commission [FCC] and the States should ensure that universal service is available at rates that are just, reasonable, and affordable." 47 USC § 254 (i)(emphasis

added); see also 47 USC § 254 (b)("Universal Service Principles"). Draft Puc 410.03, Puc 410.04 and Puc 410.05 are consistent with the Commission's ongoing responsibility to preserve and advance universal service.

Notably, under SB 48, the legislature did not abrogate this state's responsibility to preserve and advance universal service. To the contrary, the legislature expressly maintained the Commission's responsibility and jurisdiction to preserve and advance universal service by enacting RSA 362:8, I, which provides for Commission authority over: "Such obligations that arise pursuant to the commission's authority under the Communications Act of 1934, as amended." Indeed, notwithstanding the passage of SB 48, counsel for the NHTA seemed to previously agree with this assessment, stating that:

> There are a number of areas, assessments, pole attachments, universal service, intercarrier relationships, where the Commission still has jurisdiction in many respects.

See DT 12-308, Transcript of Hearing on Nov. 16, 2012, p. 62, ll. 14-17. And:

> SB 48 does not allow any carrier, including a VoIP provider, to escape any obligations it may have to preserve universal service.

See Brief of Rural Carriers of the New Hampshire Telephone Association in DT 12-308, p. 5. The telecommunications amendment attached to HB 542 did not change RSA 362:8, I. And the expressed retention of RSA 362:8, I must mean something beyond the provisions of RSA 365:1-a and RSA 374:22-p, as "the legislature is presumed not to use words that are superfluous or redundant." Frost v. Commissioner, New Hampshire Banking Dept., 163 N.H. 365, 384 (2012)(citation omitted). As a result, the Commission responsibility to preserve and advance universal service means something more than the provisions contained in RSA 365:1-a and RSA 374:22-p.

Draft Puc 410.03, Puc 410.04 and Puc 410.05 are well within the Commission's statutory jurisdiction. See also Appendix, Table of Authority for Draft 400 Rules provided by Commission staff, third page. Moreover, the Commission's ongoing authority and jurisdiction over dispute resolution processes concerning "basic service" is much more efficient and effective than the dispute resolution processes in some of the private service "agreements," such as the document attached hereto as Exhibit A.

It appears Commission staff has carefully selected critical protections on "basic service," which are necessary to preserve and advance universal service for end users. The Way Home supports these rules.

B. The Public Interest Payphone Rules Should Be Included in the Final Rules.

The following discussion is intended as a supplement to The Way Home's Comments dated May 30, 2013, at pages 6 through 9.

I. The Passage of Senate Bill 48, Chapter 177 (2012) Does Not Constitute A Legislative Determination That There Is No Longer A "Need" For Public Interest Payphones In New Hampshire.

In 1998, following notice, public hearings, and consideration of evidence compiled in the public record, the Commission determined that there is a "need" for public interest payphones in New Hampshire. Order No. 23,077, dated December 7, 1998, in DE 98-048, 83 NH PUC 654, 657 (1998). See also Order No. 23,706, dated May 17, 2001, 86 NH PUC 331, 332 (2001).

Recently enacted RSA 374:1-a makes no express reference to preserving RSA 374:22-q, Public Interest Payphones (2004). Staff suggested at the public rulemaking hearing on October 29, 2013 that this means the legislature has now determined that there is not a "need" for public interest payphones in New Hampshire.

The Way Home is not aware of any public hearings pertaining to SB 48, Chapter 177, 2012, in which the legislature considered the need for public interest payphones, or of any express findings made by the legislature that there is no longer a need for public interest payphones in New Hampshire.

The Federal Communications Commission (FCC), in implementing section 276(b) of the 1996 federal Telecommunications Act, 47 U.S.C. § 276(b), required each state to "review" whether it has adequately provided for public interest payphones, and to "evaluate" whether it needs to take any measures to ensure that payphones serving important public interests will continue to exist. Each state was required to complete such evaluation within two years of issuance of the FCC Order. FCC Report and Order dated September 20, 1996, FCC 96-388, Docket Nos. 96-128 and 91-35, para. 285, page 145. See also Appendix "D," pages 184, 185, to FCC 96-388, 47 CFR 64.1330(c).

The FCC did not mandate a particular process for the above state "review" and evaluation with respect to determining whether there is a "need" for public interest payphones. The FCC did, however, note that the states could "determine, pursuant to their own statutes and regulations, which payphones should be treated as public interest payphones." Report and Order, para. 265, page 134. Presumably, the process for designation of particular public interest payphones would take place once the state determined that there was a "need" for public interest payphones.

The FCC further noted that the above "review" may be conducted in conjunction with each state's "study" of the payphone "marketplace" which the FCC required in connection with the transition to market-based payphone compensation. Report and Order, para. 285, page 146. See also footnote 923, page 146. In discussing this market review, the FCC noted that the states

were free to "demonstrate . . . market failures" through ". . . a detailed showing" which could consist of "a detailed summary of the record in a state proceeding . . ." Report and Order, para. 61, page 33.

In omitting reference to RSA 374:22-q in RSA 374:1-a, the legislature did not make any express finding or determination that public interest payphones were no longer "needed" in New Hampshire. Certainly the legislature did not make a "detailed showing," based on a "detailed summary of a record," that would provide a basis for a determination of lack of "need" for public interest payphones. The lack of a record demonstrating a lack of "need" is in stark contrast to the detailed public record compiled in DE 98-048 which demonstrated a clear "need" for public interest payphones. 83 NH PUC 654, 657 (1998).

The failure of the legislature to make an express finding of lack of "need," and the failure of the legislature to hold public hearings or to rely on any evidence of lack of "need" for public interest payphones does not support the inference suggested by staff that passage of RSA 374:1-a constitutes a legislative determination that there is no longer a need for public interest payphones in New Hampshire.

II. RSA 374:22-q Was Not Repealed As A Result Of The Passage Of RSA 374:1-a.

1. The Doctrine of Repeal By Implication.

Recently enacted RSA 374:1-a does not reference preserving RSA 374:22-q. Staff suggests that this constitutes an implied repeal of RSA 374:22-q.

Repeal by implication occurs when the "natural weight" of all the competent evidence demonstrates that the purpose of the latter statute was to supersede the former. In such a situation, the latter statute will control although it does not expressly repeal the former law. Ingersoll v. Williams, 118 NH 135, 138 (1978).

The doctrine of implied repeal is "disfavored" in New Hampshire. Arnold v. City of Manchester, 119 NH 859, 863 (1979); Opinion of the Justices, 107 NH 325, 328 (1966) ("In this state the climate for repeal by implication is frosty and inhospitable."). Absent evidence of "convincing force" (Gazzola v. Clements, 120 NH 25, 28 (1980)) that the legislature intended a repeal, the doctrine of implied repeal will not be invoked. State v. Perra, 127 NH 533, 535 (1985), citing State v. Wilton Railroad, 89 NH 59, 61, 62 (1937).

Repeal by implication will not be found if any reasonable construction of the statutes can avoid it. State v. Miller, 115 NH 662, 663 (1975); Arnold v. City of Manchester, supra at 863 (no finding of implied repeal where court found "a reasonable construction of the two acts taken together"). The statute will not be repealed by implication unless the statutory framework reveals no other alternative. State v. DeMatteo, 134 NH 296, 299 (1991). The conflict between the two enactments must be "irreconcilable" in order to find an implied repeal. Gazzola v. Clements, supra, at 28.

2. The Doctrine of Repeal By Implication Does Not Apply In This Case Because The Statutes Can Be Reasonably Construed To Avoid An Irreconcilable Conflict.

When interpreting two statutes that deal with a similar subject matter, they should be construed so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. Grand China v. United Nat'l Ins. Co., 156 NH 429, 431 (2007); Professional Firefighters of Wolfeboro v. Town of Wolfeboro, 164 NH 18, 22 (2012).

RSA 374:22-q, which was enacted in 2004, established a public interest payphone fund to reimburse payphone providers who maintain public interest payphones at locations where the owner or person in control of the payphone site consents to the presence of the payphone. RSA 374:22-q, I and II. The statute also establishes a process for designation of and removal of a public interest payphone. RSA 374:22-q, III. The Commission is required to adopt rules, pursuant to RSA 541-A, to implement this law. RSA 374:22-q, III.

RSA 374:1-a states that with certain enumerated exceptions (of which RSA 374:22-q is not one), the provisions of RSA chapter 374 shall not apply to any end user of an excepted local exchange carrier (ELEC), or to any service provided to such end user.

Senate Bill 48, Chapter 177, 2012, contains numerous provisions to promote competition among local exchange carriers and telephone utilities, while at the same time preserving the incumbent local exchange carrier obligation to maintain an affordable basic service option. See, for example, RSA 362:8; RSA 365:1-a; RSA 374:1-a; RSA 374:22-p; and RSA 378:1-a. Furthering competition in the telecommunications industry has little to do with the Congressional goal of allowing a public interest payphone to remain in service. See 47 U.S.C. § 276(b)(2).

By definition, a public interest payphone is "a payphone which (1) fulfills a public policy objective in health, safety, or public welfare, (2) is not provided for a location provider with an existing contract for the provision of a payphone, and (3) would not otherwise exist as a result of the operation of the competitive marketplace." See Report and Order, FCC 96-388, September 20, 1996, para. 282, page 143. See also 47 U.S.C. § 276 (b)(2).

RSA 374:22-q was enacted in 2004 to implement 47 U.S.C. § 276 (b)(2) in New Hampshire. See RSA 374:22-q, II. The statute, RSA 374:22-q, is not an end user statute or an end user service statute. It is a statute that deals with funding, as well as establishing a process for designation and withdrawal of designation for public interest payphones. It is a state statute enacted to help implement a Congressional mandate to allow for public interest payphones. The statute requires minimal state regulation to ensure that payphone providers are fairly compensated for maintaining public interest payphones that would not otherwise be able to exist in the competitive marketplace.

There is no conflict between RSA 374:1-a and RSA 374:22-p. Each statute serves a different state purpose. These statutes can and should be permitted to exist together.

The situation in this case is not unlike that in State v. Wilton Railroad, supra. In Wilton, the Court held that the 1911 statute creating this Commission (formerly, Public Service Commission) did not repeal the "special powers" granted to railroads by their charters and the general law of the state, including the charter obligation to run at least one train a day to and from Wilton. The Court found that where a "special charter" is followed by "general legislation" on the same subject, which does not in terms or by necessary construction, repeal the particular special grant or regulation, "the two are deemed to stand together: one as the general law of the land, the other as the law of the particular case." State v. Wilton Railroad, supra at 62.

In this case, the legislature's failure to include reference to RSA 374:22-q in RSA 374:1-a is not significant. In enacting RSA 374:1-a, the legislature made no findings, either express or implied, that public interest payphones are no longer necessary in New Hampshire. Indeed, it was unnecessary for the legislature to address the question. RSA 374:22-q, while located in RSA chapter 374, stands apart from the other provisions of RSA chapter 374. RSA 374:22-q was not repealed, either expressly or by implication, by the legislature. There was simply no need for the legislature to do anything with RSA 374:22-q which was enacted in furtherance of federal law.

A repeal of RSA 374:22-q should not be implied. No conflict exists between RSA 374:22-q and RSA 374:1-a. Each statute is there to serve a different legislative purpose. ("In a sense the general and special laws both deal with the same subject matter. But it is in different ways and for different purposes." State v. Wilton Railroad, supra at 62.)

RSA 374:22-q and RSA 374:1-a can be reasonably construed to make the doctrine of repeal by implication inapplicable to this case.

C. Conclusion

New Hampshire Legal Assistance, on behalf of The Way Home, appreciates the opportunity to submit these Supplemental Comments to the October 3, 2013 proposed final PUC Chapter 400 Rules.

Respectfully submitted,

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Date: November 7, 2013

CERTIFICATION OF SERVICE

I certify that on this date, copies of these Supplemental Comments were sent to the Commission and all parties to this docket by electronic mail.

New Hampshire Legal Assistance

Alan Linder
Attorney For The Way Home

Dated: November 7, 2013

EXHIBIT "A"

IMPORTANT INFORMATION ABOUT YOUR FAIRPOINT COMMUNICATION SERVICES.

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A SERVICE AGREEMENT FOR YOUR FAIRPOINT SERVICES IS ENCLOSED.
Recently the laws governing telecommunications services in our state have changed and your telecommunications services may no longer be governed by tariffs filed with the state Public Utilities Commission. The terms and conditions for your retail services, unless otherwise still governed by tariff, will be provided under the FairPoint Service Agreement enclosed.

YOUR SERVICES AND PRICES ARE NOT CHANGING.
Prices and service descriptions for your FairPoint local, regional toll, long distance, and international services are located online in catalogs, price lists or product guides located at www.FairPoint.com. The Service Agreement does not change those prices and service descriptions.

WHAT DO YOU NEED TO DO?
Please read the enclosed Service Agreement carefully. If you agree with the terms and conditions of the Service Agreement, no action is required, and the Service Agreement will automatically become effective. If you do not agree with these terms and conditions, you must call FairPoint within 30 days of receiving this service agreement to cancel your services.

MORE INFORMATION IS AVAILABLE.
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BUSINESS CUSTOMERS CALL - 1.866.984.3001

FairPoint communications

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This FairPoint Service Agreement ("Agreement") applies to all FairPoint services ("Services") to which you subscribe, except for those provided under a tariff. Digital Subscriber Line and other internet services are NOT telecommunications services and are provided under a separate agreement. When you receive this Agreement, your subsequent purchase or use of Services or your payment for them is your agreement to the terms and conditions of this Agreement.

PLEASE READ THIS AGREEMENT CAREFULLY.

1. DEFINITIONS

Terms not otherwise defined in this Agreement have the following meanings:

"FAIRPOINT", "the Company", "we", "our" and "us" mean the FairPoint companies providing your detariffed services under this Agreement. FairPoint services are provided by various affiliates of FairPoint Communications, Inc. Check your bill for the names of the FairPoint companies that serve you.

"Detariffed" means that the description, price, and other terms and conditions for the service are no longer governed by tariffs filed with a state public utilities commission (intrastate services) or the Federal Communications Commission (interstate and international services).

"Force Majeure" means causes beyond our control that prevent or hinder the delivery of any Service, such as fire; flood; lightning; meteorological phenomena; earthquakes; volcanic action; power failures or blackouts; severe weather; explosions; wars or armed conflicts; national, state or local emergencies; civil disobedience; shortage of labor or materials; labor disputes, strikes, or other concerted acts of workers (whether of FairPoint or others); embargoes; acts of God; and acts of terrorism.

"Service(s)" are all the detariffed FairPoint services you subscribe to that are provided under this Agreement.

"Catalog(s)" are documents that contain the description, price, and other terms and conditions for each detariffed service. Catalogs are available online at www.FairPoint.com. If you do not have web access, you may call FAIRPOINT for assistance.

"Tariffs" are documents that are filed with state public utilities commissions (intrastate services) or the Federal Communications Commission (interstate and international services). They contain certain services, prices, and other terms and conditions that have not been detariffed. Tariffs are available online at www.FairPoint.com. If you do not have web access, you may call FairPoint for assistance.

"You" means the person subscribing to the Services provided under this Agreement.

2. CATALOGS AND TARIFFS INCORPORATED BY REFERENCE

The Catalog(s) is incorporated into this Agreement by reference. In the event of a conflict between the Catalog(s), and this Agreement, the Catalog controls, followed by this Agreement.

3. USE OF SERVICES

You agree not to use the Services for any illegal, unlawful, abusive, or fraudulent purpose. You understand and agree that you are responsible for use of the Services by all persons you authorize to use the Services. You also understand and agree that the Services are for your use and not to be resold.

4. CHARGES AND PAYMENT

a. General. You agree to pay all applicable charges for Services purchased or used by you or by anyone you authorize. This includes governmental charges, including taxes, we are required to bill you or are permitted to recover from you pursuant to applicable law. Certain charges, including, but not limited to, Universal Service Fund charges, some of which can change quarterly or more often. It is presumed that all calls dialed from your number were authorized by you. Any mathematical error made by FairPoint or any of our representatives does not constitute an offer and thus may subsequently be corrected by the Company. You also understand and agree that you may purchase other goods and services from FairPoint and other persons or entities that may be billed to your FairPoint bill and that may or may not be telecommunications related. You agree to pay all applicable charges for such goods and services purchased or used by you or by anyone you authorize. You agree to pay no later than the "due by" date specified on your bill. Monthly recurring charges may be billed one month in advance. Usage-based charges may be billed after the charges are incurred. Calls billed on a per-minute basis may be billed by rounding up to the next full minute for any fractional minutes. When a percentage discount is applied, the resulting discount may be rounded down to the nearest cent. Your first bill may include charges for the partial month in which Services began and for the following month. If your payment is dishonored, we may charge you an insufficient funds or returned check fee. If you do not pay by the due date, we may charge you a collections fee, late payment charge, and/or an interest charge. The amounts of applicable charges and fees are available either in Tariffs; Catalog(s); on your bill; or, in the case of the convenience fee, by phone prior to incurring it. Our acceptance of late or partial payment (even if marked, "PAID IN FULL" or similar words) or late payment charges shall not constitute waiver of any of our rights to collect the full amount due under this Agreement.

b. Credit. Based on your credit worthiness, we may require that you make an advance payment or deposit and/or we may set a credit limit or approved usage threshold on your account at any time. If you fail to pay for the Services when due, we may apply the deposit, other security, or advance payment to the amount you owe us.

c. Notice of Price and Fee Increases. We will provide at least thirty (30) days' notice of price increases to all affected customers, by bill insert, as a message printed on your bill, in a separate mailing, by posting on the FairPoint webpage or by any other reasonable method permitted by law. Thereafter, your continued use of the Service constitutes your acceptance of the price change. If you change your Service you agree to pay the applicable monthly fee and any one time fees that may apply to your new Service. You agree to pay all charges associated with the Service and rate plan selected, including but not limited to: applicable taxes, surcharges, Federal Universal Service Fund, tax and other recovery fees, telephone charges, activation fees, installation fees, setup fees, equipment charges, termination fees and other non-recurring charges. The amounts and what is included in such charges are subject to change. You also agree to pay any additional charges or fees applied to your billing account for any reason, including but not limited to interest and charges due to insufficient credit or insufficient funds.

d. Expiration of Promotional Prices. Promotional pricing and terms shall expire in accordance with the terms applicable to each promotion, without further notice to you.

e. Collection Fee. In the event you fail to pay billed charges when due and it becomes necessary for FairPoint to refer your account(s) to a third party for collection, FairPoint will charge a collection fee at the maximum percentage permitted by applicable law, but not to exceed 18% to cover the internal collection-related costs FairPoint has incurred on such account(s) through and including the date on which FairPoint refer(s) the account(s) to such third party.

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a. Cancellation of Services by You. You may cancel all or a portion of your Services by calling the applicable FairPoint phone number on your bill. Cancellation of Services by you may result in early termination fees if you are subscribed to a term plan for Services. The Catalogs specify conditions applicable to cancellation of Services, including termination fees, if any. If you do not call to cancel, you agree to pay for all Services you order, use, or pay for, and those Services continue to be governed by this Agreement.

b. Discontinuance, Suspension, or Cancellation of Services by FairPoint. If we believe the Services are being used fraudulently, abusively, illegally, or unlawfully, we reserve the right to immediately and without notice suspend, restrict, or cancel them. If you do not pay the undisputed portion of your bill by the required due date, we may suspend, restrict, or cancel the Services with advance notice to you. If you violate any other term or condition of this Agreement, we may suspend, restrict, or cancel the Services if the violation is not remedied within a reasonable period of time after we provide notice to you. If you ask us to reinstate your Services following suspension or cancellation for any of the above reasons, we may require you to pay a deposit or a reconnection fee, or both. We may suspend or terminate any Services affected by a Force Majeure event, without notice to you. Services may be subject to availability of facilities and FairPoint may withdraw Services offerings upon prior notice.

c. Repair of Services. We have the right at any time to suspend or interrupt Services to make necessary repairs or changes in our facilities. We may refuse to repair Services if we determine that the conditions at your premises are unsafe for us, our agents, and/or our contractors.

6. INDEMNIFICATION

You agree to indemnify FairPoint and hold FairPoint harmless for any damages, costs, liabilities and attorneys' fees FairPoint may incur from any claim arising from your use of the Services, or the use of your Service by others, including without limitation, violation of the copyrights, trademarks or other intellectual property rights of others, your combination of the Services with other products or services not provided by FairPoint, any modification of the Services, or any breach of this Agreement by you. In such event, you agree to conduct the defense and have control of the litigation and settlement, if any. However, you agree not to acquiesce to any judgment or enter into any settlement that adversely affects our rights or interests without FairPoint's prior written consent. FairPoint agrees to give you prompt notice of all claims and to cooperate in defending against the claim. You may not settle any claim under this section which includes an admission of criminal liability or the payment of a settlement amount without the prior written permission of FairPoint. This provision shall survive termination of this Agreement.

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IN NO EVENT SHALL FAIRPOINT OR ANY OF ITS THIRD PARTY LICENSORS, PROVIDERS OR SUPPLIERS BE LIABLE TO YOU FOR (A) ANY PUNITIVE, SPECIAL, CONSEQUENTIAL, INCIDENTAL OR INDIRECT DAMAGES INCLUDING WITHOUT LIMITATION, LOST PROFITS OR LOSS OR DAMAGE TO DATA ARISING OUT OF THE USE OR INABILITY TO USE SERVICES, EVEN IF FAIRPOINT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR (B) ANY CLAIMS AGAINST YOU BY ANY THIRD PARTY. FAIRPOINT'S AGGREGATE LIABILITY TO YOU FOR ANY CAUSE OF ACTION OR CLAIM WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ANY NON-INSTALLATION, SECURITY BREACH, FAILURE OR DISRUPTION OF SERVICES PROVIDED UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT OR TORT, OR OTHERWISE, SHALL BE LIMITED TO AN AMOUNT EQUIVALENT TO CHARGES PAID BY YOU UNDER THE APPLICABLE SERVICE AGREEMENT DURING THE PERIODS WHEN SUCH CLAIM AROSE. SOME JURISDICTIONS DO NOT PERMIT THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF CONSEQUENTIAL OR INCIDENTAL DAMAGES. IN THESE JURISDICTIONS OUR LIABILITY SHALL BE LIMITED TO THE MAXIMUM EXTENT PERMITTED BY LAW. ALL LIMITATIONS AND DISCLAIMERS STATED IN THIS AGREEMENT ALSO APPLY TO FAIRPOINT'S THIRD PARTY LICENSORS, PROVIDERS AND SUPPLIERS AS THIRD PARTY BENEFICIARIES OF THIS AGREEMENT

9. DISPUTE RESOLUTION

The parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, except for action seeking a temporary restraining order or injunction related to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, which the parties agree may be filed only in a court located in the State of North Carolina, the parties agree to use the following alternative dispute resolution procedure as their sole remedy with respect to any controversy or claim arising out of or relating to this Agreement or its breach. The parties further agree that this Agreement does not permit class arbitration, even if the procedures or rules of the American Arbitration Association (or other dispute resolution organization or body) would otherwise permit it.

At the written request of a party, each party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The parties intend that these negotiations be conducted by non-lawyer representatives. The location, format, frequency, duration, and conclusion of these discussions shall be left to the discretion of the representatives. Upon agreement, the representatives may mutually agree to utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. Discussions and correspondence among the representatives for purposes of these negotiations shall be treated as confidential information developed for purposes of settlement, exempt from discovery and production, which shall not be admissible in the arbitration described below or in any lawsuit without the concurrence of all parties. Documents identified in or provided with such communications that are not prepared for purposes of the negotiations are not so exempted and may, if otherwise admissible, be admitted in evidence in the arbitration or lawsuit.

If the negotiations do not resolve the dispute within sixty (60) calendar days of the initial written request, and the amount in controversy exceeds five thousand ($5,000.00) dollars or the jurisdictional limit for small claims court in the jurisdiction in which service is provided (whichever is less), the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Arbitration Rules of the American Arbitration Association.

A party may demand such arbitration in accordance with the procedures set out in those rules. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set out in this section. Each party may submit in writing to a party, and that party shall so respond, to a maximum of any combination of twenty-five (25) (none of which may have subparts) of the following: interrogatories, demands to produce documents and requests for admission. Each party is also entitled to take the oral deposition of one (1) individual representing another party. Additional discovery may be permitted upon mutual agreement of the parties. The arbitration hearing shall be commenced within sixty (60) calendar days of the demand for arbitration. The arbitration shall be held in the State of Maine. The arbitrator shall control the scheduling so as to process the matter expeditiously. The parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within thirty (30) calendar days after the close of hearings. The times specified in this section may be changed upon mutual agreement of the parties or by the arbitrator upon a showing of good cause. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

If the negotiations do not resolve the dispute within sixty (60) calendar days of the initial written request, and the amount in controversy does not exceed five thousand ($5,000.00) dollars or the jurisdictional limit for small claims court in the jurisdiction in which service is provided (whichever is less), the dispute may be submitted to small claims court in the jurisdiction in which service is provided for resolution in accordance with its rules and procedures.

Each party shall bear its own costs of these procedures. A party seeking discovery shall reimburse the responding party the costs of production of documents (to include reasonable search time and reproduction costs). The parties shall equally split the fees of the arbitration and the arbitrator.

YOU AGREE THAT, BY ENTERING INTO THIS AGREEMENT, YOU AND FAIRPOINT ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY AND TO PARTICIPATE IN A CLASS ACTION. YOU AND FAIRPOINT AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.

10. CHANGES TO THIS AGREEMENT

From time to time, we may change this Agreement, including the terms and conditions of the Catalogs which are part of this Agreement. If any such change results in more restrictive terms or conditions, we will provide you at least thirty (30) days' notice, by bill insert, as a message printed on your bill, in a separate mailing, by posting on FairPoint's webpage or by any other reasonable method permitted by law.

11. MISCELLANEOUS

After receipt of any notice required by this Agreement, your purchase or use of Services or your payment for them is your agreement to the changes described therein, as of their effective date. Services are provided subject to billing and technical limitations, and not all Services are available in all areas. This Agreement does not give any third party a remedy, claim, or right of reimbursement. You understand that it may be possible for unauthorized third parties to monitor data traffic. If you desire to secure your transmissions in connection with any Services, you shall procure, at your own cost, encryption software or other transmission protection. You assume full responsibility for the establishment of appropriate security measures to control access to your equipment and information. You agree that we may call you about the Services we provide you under this Agreement and the services that other FairPoint affiliates provide you under separate agreements, whether such calls are automated, handled by a live attendant, or are provided through other means.

12. ASSIGNMENT

Except as otherwise may be provided under any applicable state laws or requirements, we reserve the right to assign or otherwise transfer by merger or operation of law all or part of our rights or duties under this Agreement without notice. You may not assign this Agreement or the Services to which you subscribe without the prior written consent of FairPoint, which will not be unreasonably withheld.

13. ENTIRE AGREEMENT

This Agreement, which incorporates by reference applicable Catalogs, sets forth the entire agreement between you and FairPoint and, with respect to the Services covered by this Agreement, takes the place of all previous agreements, understandings, statements, proposals, and representations between us, whether written or oral. This Agreement can be amended solely as provided in Section 10.

14. SURVIVABILITY

The terms and conditions contained in this Agreement that by their sense and context are intended to survive the performance hereof by either or both parties shall so survive the completion of performance, cancellation, or termination of this Agreement. Waiver by either party of any default by the other party shall not be deemed a continuing waiver of such default or a waiver of any other default.

15. SEVERABILITY

Except as provided herein, if any provision, phrase or wording of this Agreement is determined to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the remainder of this Agreement, but rather the entire Agreement shall be construed as if not containing the particular invalid or unenforceable provision, phrase or wording and the rights and obligations of the parties to this Agreement shall be construed and enforced accordingly.

16. GOVERNING LAW

The law of the state in which you receive Services applies, without regard to its conflict of law principles, except to the extent that such law is preempted by applicable federal law. You may have certain rights under state law. To the extent that applicable state laws do not permit this Agreement to supersede such rights, those state rights will govern, except where such state law is preempted by applicable federal law, such as the Federal Arbitration Act.