

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

INITIAL BRIEF OF THE CLECS

On October 11, 2013, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and subsets of the following Competitive Local Exchange Carriers (“CLEC”): CTC Communications Corp., Choice One Communications, Lightship Telecom, LLC and Conversent Communications, all d/b/a EarthLink Business; Freedom Ring Communications LLC d/b/a BayRing Communications; Comcast Phone of Maine, LLC, Comcast Phone of New Hampshire, LLC and Comcast Phone of Vermont, LLC; Biddeford Internet Corporation, d/b/a/ Great Works Internet; CRC Communications LLC and Mid-Maine TelPlus LLC d/b/a/ OTT Communications; and National Mobile Communications Corporation d/b/a Sovernet Communications (collectively, the “Moving Parties”) filed Joint Motions for Approval of a Wholesale Performance Plan (“WPP” or “Plan”) Stipulation and Settlement Agreement (“WPP Agreement”) before the Maine Public Utilities Commission (Docket Nos. 2009-00166, 2009-00291, 2009-00334), the New Hampshire Public Utilities Commission (DT 11-0161), and the Vermont Public Service Board (Docket 7506) (collectively referred to as the Commission or Commissions).

The Joint Motions sought Commission approval of the WPP Agreement and Commission resolution, following briefing, of three outstanding issues not resolved by the Moving Parties: (i) commercial contract provisions that waive WPP bill credits; (ii) change of law provisions; and

(iii) terms and penalties for late or inaccurate monthly reports. All three States directed the filing of Initial Briefs by November 8, 2013.¹

The undersigned CLECs (collectively, the “CLECs”) submit this brief in accordance with the schedule established. Although the CLEC parties active in the various state dockets vary slightly, a single uniform Initial Brief is being filed in each of the three states given the uniformity of the issues and the ultimate objective to obtain a single three-state Plan.

The CLECs respectfully request that the Commission:

- (a) determine that the WPP is not subject to waiver such that all eligible CLECs will be included within the bill credit provisions of the new Plan in order to maintain the effectiveness of the new WPP in ensuring an open and competitive telecommunications market;
- (b) adopt and incorporate the change in law clause proposed by the CLECs, which appropriately accounts for potential changes in applicable law and establishes an orderly process for their implementation, with proper Commission oversight, and
- (c) adopt and incorporate the accuracy and timeliness of reporting terms proposed by the CLECs to properly incent FairPoint to collect and report accurate results on a timely basis.

¹ Letter of Debra Howland to Parties, October 18, 2013; Vermont Public Service Board, Docket 7506, Hearing Officer Scheduling Order, October 25, 2013; Maine Public Utilities Commission Procedural Order (Scheduling), October 25, 2013.

I. The Commission Should Determine That All Eligible CLECs Are Encompassed Within The New WPP And That FairPoint May Not Enter Into Or Enforce Any Agreement That Waives Or Foregoes Any WPP Bill Credits.

a. Introduction

The objective of the WPP is to ensure that the telecommunications market remains open to robust competition. The WPP accomplishes that objective through the measurement and reporting of FairPoint's performance in providing services, access, and interconnection to telecommunications carriers that are critical to competition. To serve its fundamental purpose, the Plan must include all carriers and qualifying services, without exception. Ongoing efforts by FairPoint to exclude certain carriers or products from the Plan through contract-based waivers should not be countenanced by the Commission.

The Plan as agreed-to by FairPoint specifically includes within its scope each and every CLEC that has "established a CLEC profile with FairPoint and purchases services, interconnection, and/or access covered by the scope of the Plan within a given month." Indeed, the "Monthly CLEC results (CLEC-specific and CLEC-aggregate) reported in th[e] plan include all eligible CLEC transactions." Moreover, the Plan contains a full series of bill credit penalties, payable to all eligible CLECs, that are specifically designed to ensure that FairPoint provides each service or product at levels equal to FairPoint retail services or other established benchmarks. If the WPP allows FairPoint to obtain or enforce waivers of such bill credit penalties (such that penalties are not paid out) from individual CLECs, the pro-competitive incentive structure of the Plan breaks down for all CLECs and the overall competitive marketplace.

b. Background

The requirement that FairPoint's predecessor in interest, Verizon, implement a Performance Assurance Plan (PAP) in each of the three States arose out of Verizon's efforts to obtain authority to provide in-region, interLATA services pursuant to Section 271 of the Telecommunications Act of 1996 (TelAct). Section 271(d)(2)(B) of the TelAct required the Federal Communications Commission (FCC) to consult with the regulatory commission of each state to ensure compliance with the requirements of competitive checklist contained in subsection 271(c) of the Act. Maine, New Hampshire, and Vermont ultimately reported to the FCC that, in their opinion, Verizon met the Section 271 checklist set out in the statute. In each case, however, the Commission conditioned its positive recommendation to the FCC on the inclusion of a self-executing PAP created and designed to ensure Verizon's continued compliance with the requirements of Section 271.² In other words, the PAP was intended to deter backsliding in the provision of wholesale services deemed critical to competitive carriers.

Since the time of the adoption of the original PAPs, there have been several changes to the products that are required to be offered under Section 251, and potentially under Section 271, of the TelAct. In some instances, the FCC has "delisted" products formerly required by Section 251 of the TelAct. Following the FCC's delisting of "UNE-P" products from those required by Section 251 of the TelAct, Verizon developed a product that it called "Wholesale Advantage." Verizon considered Wholesale Advantage to be a commercial product offered voluntarily and not subject to regulatory oversight under Sections 251 or 271 of the TelAct. In order to purchase Wholesale Advantage services, Verizon required CLECs to sign commercial Wholesale

² See, e.g., Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, FCC Docket No. 02-61, MPUC Docket No. 2001-849 (April 10, 2002) (Maine Report) at 1.

Advantage agreements which contained provisions stating that the product was not subject to any PAP penalties. In addition to relinquishing penalties associated with UNE-P replacement/Wholesale Advantage service, these agreements also required the CLEC to forgo *all other* PAP penalties – including those related to products still required by sections 251 and/or 271 of the Act and covered by the PAP.

Unfortunately, FairPoint has continued and expanded Verizon's practices by conditioning the offering of a wholesale service that it considers to be unregulated on the inclusion in a commercial agreement of language which not only precludes the collection of any penalties associated with the specific wholesale service subject to the contract, but also requires that any penalty payments associated with services offered under any other agreement (including a standard interconnection agreement) or tariff (including a wholesale tariff or SGAT) revert to FairPoint. Thus, a CLEC is required to waive *all* entitlements to PAP credits for deficiencies in the delivery of any wholesale services – even those required to be offered under Sections 251 and 271 of the TelAct. This tactic has threatened, and continues to threaten, the efficacy of the PAP as a means of preventing backsliding in the delivery of wholesale services to carriers.

c. WPP Penalty Waivers Will Greatly Undermine the WPP's Ability to Ensure an Open and Competitive Marketplace.

The existence of the WPP penalty waivers greatly undermines the performance plans as effective tools for ensuring an open and competitive marketplace. By extracting waiver agreements from individual carriers, FairPoint reduces its own financial incentive for maintaining or improving its performance to the detriment of all carriers and the competitive marketplace. To the extent FairPoint is permitted to continue its practice of imposing bill credit penalty waivers on individual carriers under the new WPP, *all* carriers are potentially harmed.

Regardless of the reasons why an individual carrier consents to a waiver, the resultant harm is suffered by all and the efficacy of the marketplace is jeopardized.

While the CLECs do not have access to the accounts of all carriers that are eligible to receive PAP credits, it appears that roughly *half* of the PAP credits that should be paid each month are never actually paid by FairPoint due to waivers imposed by FairPoint wholesale agreements.³ Thus, the financial incentives that the Commissions intentionally built into the original PAPs to deter backsliding are being severely weakened.

In recognition of structural changes in the telecommunications industry generally and within FairPoint specifically, the Moving Parties agreed to a drastically restructured performance assurance plan, with potentially far lower bill credits. The fact that the WPP reduces the amount of dollars at risk for New England from \$86.72 to \$12 million annually means that the detrimental effect of each waiver is magnified. If the Commissions continue to allow FairPoint to enforce penalty waivers, the WPP's \$12 million cap has the effect of being a \$6 million a year cap.

Accordingly, the CLECs respectfully request that the Commission find that WPP penalties are not subject to waiver by any party. The WPP terms agreed-upon by the Moving Parties should be adopted and enforced as drafted and not be permitted to be undermined by any bill credit waivers or similar contrivances.

³ Information provided by FairPoint in response to data requests in various state proceedings reveals that approximately 48% - 60% of PAP bill credit penalties have not been paid. *See, e.g.*, FairPoint response to One Communications Request 1-5 in NHPUC Docket No. 09-113 and DPS-FRP 1-1(a) in VT PSB Docket No. 7539, setting forth the amount of PAP penalties not paid due to Wholesale Advantage from January through July of 2009.

II. THE COMMISSION SHOULD ADOPT THE CLECS' CHANGE OF LAW PROPSAL

The change in law clause proposed by the CLECs appropriately accounts for potential changes in applicable law and establishes an orderly process for the implementation of such developments in a bilateral manner – with proper Commission oversight. Given the manner in which the components of the Plan itself were agreed-upon by the parties, and are subject to Commission approval and ongoing oversight, it would be entirely inconsistent and inappropriate to allow unilateral modification by any one party. As such, the Commission is respectfully requested to incorporate into the Plan the change of law clause that preserves terms largely agreed-upon and reject additional terms that would permit unilateral and potentially erroneous modification to substantive Plan provisions.

a. The Change of Law Elements Agreed Upon by All Parties

The Moving Parties reached agreement in principle on the following terms to account for changes in law, which the CLECs firmly believe to be (together with the procedures included in the following subsection) entirely sufficient:

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

These provisions contain several important elements. Substantively, the terms account for any type of change to applicable law, whether legislative, regulatory, or judicial, or even some other governmental decision, order, determination or action. In addition, the terms appropriately provide that an actionable change in law is one that substantively affects any material provision of the Plan.

Procedurally, the terms include an orderly process for the parties to consider any such changes in law and suitable plan revisions. Negotiations would be initiated on notice to all parties to the Commission's WPP proceeding docket, the result of which would hopefully be agreement on changes to the Plan to account for the change in law.

b. Additional Procedures Requested by the CLECs

The CLECs propose that the Plan's change in law clause include a specific role for the Commission, in either approving agreed-upon revisions or resolving any differences, as follows:

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

Thus, where a negotiated resolution is achievable, the proposed revisions would be submitted jointly to the Commission for approval. This procedure is consistent with the process that resulted in the Plan that has now been agreed-upon and submitted jointly to the Commission for approval. In the absence of agreement on appropriate revisions, a party would have the right to submit the matter to the Commission for resolution, which is likewise consistent with the process currently underway, through which the Commission is resolving the three open issues.

c. FairPoint Should Not Be Allowed to Make Changes to the WPP Without Commission Approval Proposal

While agreeing in principle to elements of the orderly process outlined above, the CLECs expect FairPoint to propose provisions that reserve for itself the unilateral right to modify Plan terms that have been painstakingly negotiated and agreed-upon. Since no party may have the ability to unilaterally undo the terms of a stipulated multilateral agreement, FairPoint's position is untenable and must be rejected.

FairPoint's approach would supersede and thus eclipse the rational, negotiated process to account for changes in law. FairPoint would allow itself to decide that it is not required to

provide any service/product currently reported in the WPP and would unilaterally eliminate any metrics or bill credits associated with that service/product.

Thus, FairPoint would substitute its interpretation for the meaning of any “legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in applicable law” for that of the CLECs, the Commission, and Commission staff. Moreover, there would not even be a process under which the terms of the Plan would actually be modified, as FairPoint’s determination would simply remove metrics and bill credits without any Plan amendment or Commission approval.

As noted in Section I, above, the WPP and its predecessor PAP were created to ensure that markets opened to competition remained open following a determination that each element of the Section 271 checklist was met. The metrics and bill credits are the self-effectuating incentives that ensure adequate provision of each service and product that FairPoint is required to provide. The idea of allowing FairPoint to decide when it would no longer be subject to any metrics or bill credits associated with [a] service/product is as illogical as allowing the proverbial fox to determine the adequacy of security at the hen house.

In sum, the FairPoint-proposed unilateral determination clause is unjust, unworkable, and inconsistent with the process by which the material terms of the Plan have been agreed-upon. The Commission should allow no party to unilaterally modify detailed metric provisions and penalties painstakingly agreed-upon and submitted jointly for Commission approval.

The change in law clause proposed by the CLECs appropriately accounts for potential changes in applicable law and establishes an orderly process for their implementation, with

proper Commission oversight. The Commission is thus respectfully requested to adopt the following as the entirety of the change in law clause for the Plan:

If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint and the parties to the respective Commission and Board dockets will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law. Upon agreement, such revisions will be submitted jointly by the parties participating in the negotiations to the Commissions and Board for approval. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commissions and Board.

III. The WPP Must Contain Terms To Properly Incent FairPoint To Collect And Report Accurate Results, And Issue Bill Credits to CLECs When FairPoint Fails To Issue Reports Timely And Accurately

a. Introduction

The Wholesale Performance Plan (“WPP”) needs a strong provision on late and inaccurate reports to ensure its effectiveness in protecting the competitive environment from substandard or discriminatory actions. It is of threshold, pivotal importance that the WPP accurately measure, report and incent FairPoint’s performance in providing products and services essential to a competitive market. Without accurate reports, the WPP is of little utility.

Timely reporting by FairPoint of its performance is also critical, enabling prompt evaluation of such performance and timely issuance of performance bill credits. Where FairPoint’s wholesale performance is inadequate, timely reporting will also promote timely fixes.

FairPoint cannot reasonably oppose WPP provisions for accurate and timely reporting of performance under the WPP. Indeed, FairPoint executives and subject matter experts painstakingly negotiated and agreed to each and every metric, definition, standard and reporting obligation in the WPP.

b. Background

The most realistic way to incentivize FairPoint on the front end and hold it accountable for poor performance on the back end is to impose penalties for failures of performance.⁴ FairPoint is the only entity that has significant insight into the processes and data, particularly retail parity data for which CLECs have no insight and no ability to obtain on their own, that formulate the WPP’s results. It is therefore fully appropriate for the WPP to ensure that FairPoint meets its responsibility to create and maintain proper controls and oversight of the WPP reporting process.

FairPoint’s own historical performance of measuring and reporting results under the outgoing Performance Assurance Plan (“PAP”) further supports the need for significant and meaningful incentives to ensure timely and accurate reporting under the WPP. The PAP audit conducted by Liberty Consulting Group, for example, reported 115 defects⁵ (inaccuracies) in a review of only 105 metrics.⁶ Indeed, Liberty’s PAP audit scope was narrow, as Liberty itself noted that the audit did not encompass “an audit of the accuracy of the data that resides in the source OSS,”⁷ such that more inaccuracies likely existed than were reported by Liberty.

The Liberty audit also found that FairPoint failed to maintain data to allow the proper audit of certain time periods.⁸ This lack of data also restricted FairPoint’s ability to restate inaccurate reporting discovered by the audit. In addition, the audit discovered that FairPoint

⁴ The assessment of significant penalties has long been utilized by regulators, law enforcement bureaus and taxation authorities, for example, to incent accurate reporting or deter improper action.

⁵ PAP Audit at p. 2.

⁶ *Id.* at p. 1.

⁷ *Id.* at p. 14.

⁸ *Id.* at p. 2

internally found errors,⁹ yet did not disclose the errors or restate results on its own accord.

c. The CLECs' Proposal Provides the Proper Incentives for Accurate and Timely Reporting by FairPoint

The new WPP represents a simplified and streamlined performance assurance plan.

Given that all of the metrics and Plan terms have been specifically negotiated and embraced by FairPoint, the inclusion of robust provisions ensuring accurate and timely reporting is critical to promoting accountability and guarding against inaccurate results. The Plan must include the following provisions relating to late and inaccurate reports:

1. Penalties for filing late reports;
2. Responsibility for detecting and reporting inaccuracies;
3. Responsibility for monthly report restatement, based on the significance or materiality of inaccuracies;
4. Penalties significant enough to incent accurate reporting; and
5. Procedures to address disagreements concerning the accuracy of the reports.

Exhibit A hereto contains the CLECs' proposed language for addressing each of the areas noted above. These provisions will incent FairPoint to report accurate results and will hold FairPoint accountable to those harmed by inaccurate reporting.

i. Penalties For Filing Late Reports

The CLEC proposal contains a disincentive for reporting performance results later than what has been agreed upon in the Plan, in the form of a simple \$500 penalty per State for each day the monthly data or WPP Reports are late. This penalty is in the same amount currently contained in the Maine PAP, and is appropriately based on the specific performance failure and continues to accrue for the duration of that failure.

⁹ *Id.* at p. 40.

ii. Responsibility For Detecting and Reporting Inaccuracies

FairPoint properly bears primary responsibility for detecting and disclosing data inaccuracies since FairPoint is the only party that collects the performance data and has access to the majority of information needed to verify data and calculations. While recognizing this fact, the terms proposed by the CLECs note the obligation on each carrier to also review its monthly reports for errors, and report the discovery of any inaccuracies to FairPoint on a timely basis (*i.e.*, within 30 days of discovery of an error).

It is important that FairPoint disclose inaccuracies to the CLECs in order to enable CLEC evaluation of FairPoint's performance in any given month or over a period of time. As noted above, Liberty discovered several inaccuracies and changes to PAP calculations that, while fixed by FairPoint, were never affirmatively disclosed to the CLECs. For the WPP to be effective, the collection and reporting of data must be as transparent as possible.

iii. Responsibility for Monthly Report Restatement

FairPoint must correct erroneous data reports in order for the Commissions and competitors to have an accurate picture of FairPoint's performance. The terms proposed by the CLECs appropriately require FairPoint to restate incorrect WPP reports for one of three different time periods, depending on the materiality of the inaccuracy and whether the inaccuracy is discovered during an audit process.

To ensure accurate reporting, the Plan also must impose on FairPoint the responsibility to restate previous reports when material errors in those reports are discovered. In instances where errors are material and poor performance is hidden by inaccurate reports (known or unknown), the competitive market is harmed and bill credits may be improperly avoided.

The terms proposed by the CLECs require FairPoint to correct reports up to a maximum of 24 months, depending on the materiality of the error(s). If the error is discovered by an audit that was initiated more than 24 months prior to the issuance of the inaccurate report, FairPoint will be required to correct reports for the full audit period.¹⁰ For less material errors, a shorter 12-month period for restatements is proposed. No restatement of reports is required where the reporting errors are immaterial. This multi-threshold trigger for restatement strikes a reasonable balance between reporting accuracy and the dedication of FairPoint resources to ensure such reporting.

iv. Penalties Must Be Significant Enough to Incent Accurate Reporting

The CLECs propose that FairPoint pay the higher of either: (1) a 15% penalty assessed in addition to any corrective credits; or (2) the interest owed on any restated amounts due. The CLECs believe such an approach appropriately increases the size of the penalty with size of the error (subject to the 15% cap). A per diem to penalties would fail to recognize the significance of the size or scope of a particular inaccuracy. The CLECs' proposal requires the penalty assessment to be based on the corrective bill credits for all revised reports, and not just the current month, and, therefore provides the necessary incentive to FairPoint for more accurate results at the time reports are initially issued.

If the 15% penalty assessment is lower than the simple interest calculation that FairPoint would owe on corrective bill credits then the penalty would be based on the simple interest calculation. Such an approach reflects common business practices which account for the time value of money and lost opportunity costs for the recipient of the interest amounts.

¹⁰ The Maine PAP imposes a similar timeframe for correction of performance reports. See Maine PAP at page 19, footnote 19. A two-year time period is likewise a reasonable period of time to require FairPoint to maintain the data needed to recalculate monthly PAP reports.

Finally, all penalties for late and inaccurate reporting should be paid to the CLECs, who are the entities harmed by such inaccurate or untimely reporting, rather than paid to any third-party fund or organization.

v. Procedures To Address Disagreements Concerning Accurate Reporting

The CLECs have proposed clear terms and procedures for resolving any disagreements regarding accurate reporting. The terms provide that the CLECs and FairPoint would work together in good faith to resolve the issue, and to the extent resolution is not possible to reach resolution, either party may petition the Commission. This procedure represents the current, normal course of business for any dispute between CLECs and FairPoint.

The proposed WPP terms also outline a procedure that allows a CLEC to initiate an audit or review – upon approval by the Commission – by an independent third party to evaluate issues specifically related to a dispute. Because a review and audit of WPP metrics may be complex, technical, and time consuming, a third party may be needed to augment CLEC and Commission resources. The terms proposed by the CLECs reasonably allocate the cost of the third party review, with the CLEC requesting the review initially assuming the costs and FairPoint only being responsible for reimbursing the CLEC if FairPoint is found to be in error. This limited ability to invoke a third party review is designed as a means to resolve specific disputes, as opposed to the full Commission-ordered audit described in Section I of the Plan.

d. The CLECs' Proposal Should Be Adopted

The WPP terms proposed by the CLECs will properly incent FairPoint to develop processes, procedures and controls to collect and report accurate results the first time reports are issued for any given month. Should FairPoint fail to meet its responsibility, FairPoint would pay bill credit penalties in an appropriate amount, relative to the significance of the inaccuracy, to the

CLECs who are harmed. As with the bill credits for specific performance failures, the bill credit penalties for late or inaccurate reports should deter future performance failures relating to report timeliness and accuracy. The CLECs respectfully request that the Commission adopt, in full, the provisions set forth in Exhibit A to incentivize timely and accurate reports under the new WPP.

IV. CONCLUSION

The WPP proposed by the Moving Parties represents a significant achievement, in that it's a majority of the terms have been specifically negotiated by and agreed-upon by the Moving Parties. The CLECs' proposals on the three issues briefed above will help to ensure the effectiveness of the new, stipulated Plan. In furtherance of that goal, the Commission is respectfully requested to:

- (a) determine that the WPP is not subject to waiver, such that all eligible CLECs will be included in the bill credit payment provisions of the new Plan, in order to maintain the effectiveness of the Plan in ensuring an open and competitive telecommunications market;
- (b) adopt and incorporate the change in law clause proposed by the CLECs that appropriately accounts for potential changes in applicable law and establishes an orderly process for their implementation, with proper Commission oversight, and
- (c) adopt and incorporate the accuracy and timeliness of reporting terms proposed by the CLECs to properly incent FairPoint to collect and report accurate results on a timely basis.

FREEDOM RING COMMUNICATIONS d/b/a
BAYRING COMMUNICATIONS

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

BIDDEFORD INTERNET CORPORATION
d/b/a GREAT WORKS INTERNET

CRC COMMUNICATIONS LLC d/b/a OTT
COMMUNICATIONS

NATIONAL MOBILE COMMUNICATIONS
CORPORATION d/b/a SOVERNETH
COMMUNICATIONS

Dated: November 8, 2013

By: Trina Bragdon (ssg)

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

CERTIFICATE OF SERVICE

I, Trina Bragdon, hereby certify that copies of the Opening Brief of the CLECs was delivered via e-mail to the parties on the Commission's electronic service list on this 8th day of November, 2013.

Trina M. Bragdon (asg)
Trina M. Bragdon

Exhibit A

Proposed Terms to Ensure Timely and Accurate Reports Under the New Wholesale Performance Plan (WPP)

D. LATE OR INACCURATE REPORTS

The WPP includes the following provisions to address late or inaccurate WPP Reports. Late or inaccurate WPP penalties or assessments shall not be considered under Section F “Cap on Total Annual Bill Credits”.

1. Late Performance Reports:

If the FairPoint performance data and associated WPP Reports are not posted to the FairPoint website on the due day,¹¹ FairPoint shall issue bill credits in the amount of \$500 per day, per state, for each day the data or WPP Reports are late. Such bill credits will be allocated among eligible CLECs pursuant to Section B(2)(a) of this Plan.

2. Inaccurate Reports:

FairPoint will have an ongoing responsibility to identify and correct any inaccuracies in its monthly WPP Reports (including, without limitation, bill credit calculation and posting). CLECs receiving monthly Reports shall likewise review FairPoint’s monthly WPP Reports and identify possible inaccuracies utilizing the information provided by FairPoint and the CLEC’s own records.

FairPoint and CLECs each have the responsibility to notify one another of inaccuracies within 30 days of discovery. If FairPoint and CLECs agree the WPP Report(s) contain error(s), FairPoint will calculate the effect of such error(s) on an aggregate and CLEC-specific basis. If

¹¹ If the 28th day is a weekend or holiday, the monthly reports will be provided by the next business day.

the effect of the error(s) is material,¹² FairPoint will correct and reissue all affected WPP Reports and data, and post corrective credits for the greater of the following periods:

- (a) If the error was identified by an audit, the period of time covered by the audit and all subsequent period of time after the audit period of the audit that identified such error, or
- (b) If the error was discovered by or reported to FairPoint, the period will encompass the monthly reports generated after the error was discovered or reported and the prior 12 months if correction of the error(s) would increase, on average, credits under the WPP by \$500 per month for an individual CLEC or \$2,500 on an aggregate CLEC basis, or 24 months if correction of the error(s) would increase, on average, credits under the WPP by \$1,000 per month for an individual CLEC or \$5,000 on an aggregate CLEC basis.

Revised Reports correcting material errors will be corrected and filed within 60 days of confirmation of the error(s). 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. Non-material errors will be corrected on a prospective basis, beginning 30 days from confirmation of the error.

FairPoint shall post corrective bill credits to all affected CLEC BANs within 30 days of reissuance of the previously erroneous WPP Report(s). In addition to the posting of corrective

¹² A material error is one where the correction of that error, or a combination of errors, would increase an individual CLEC's right to credits under the WPP for the month by at least \$500 for an individual CLEC or \$2,500 on an aggregate CLEC basis. Upon notification of an inaccuracy or potential inaccuracy by a CLEC, FairPoint will provide an estimate of the effect of that possible error on a CLEC-aggregate basis.

credits, FairPoint shall also post bill credits equal to the greater of (i) interest on the corrective credits at the interest rate FairPoint charges CLECs for late payments under its wholesale tariffs or (ii) an inaccuracy penalty of 15% of the corrective credits.

FairPoint and the CLEC(s) will consult with one another and attempt in good faith to resolve any issues regarding the accuracy or integrity of data collected, generated, and reported pursuant to the WPP. If FairPoint and the CLEC(s) cannot agree on whether a WPP Report is incomplete or erroneous, or if they cannot agree on whether an inaccuracy is material, either FairPoint or the CLEC(s) may file a petition asking the Commission or Board to resolve the dispute. If the Commission or Board determines that one or more WPP Report(s) were incomplete or erroneous, FairPoint shall reissue such Report(s), issue corrective bill credits, and post the additional bill credits for payments and interest in accordance with the provisions stated above.

With approval of the Commission or Board, or authorized staff, a CLEC may initiate an independent audit or review conducted by a qualified independent third-party, at the CLEC's expense. Such audit or review will be limited to the data collection, computing, and reporting process issue(s) raised by the CLEC. FairPoint shall have the opportunity to review the independent third-party's proposed audit or review approach, fees and schedule, upon proposal of the audit or review to the Commission, Board or staff. Any concerns between the parties regarding the proposed audit or review costs, approach and schedule are to be negotiated in good faith.

In the event the audit or review affirms the issue initially presented by the CLEC and denied by FairPoint, as materially affecting reported performance results, FairPoint shall reimburse the CLEC for the costs of the independent third-party audit or review. A CLEC may

not request, pursuant to these provisions, more than one audit or review within a six month period, and may not request an audit or review of the same performance measurement more than once in a twelve calendar month period, although these provisions do not modify a CLEC's audit rights under other provisions of this WPP, agreement, or any applicable Commission/Board Order. FairPoint agrees to inform all CLECs via Accessible Letter of any problem identified during an audit/review initiated by any CLEC. The CLEC-initiated audit or review is distinct from the Commission or Board-directed audit addressed separately in Section I of this Plan.
