

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 10-025

**Request for Approvals in Connection with the
Reorganization Plan of FairPoint Communications, Inc., et al.**

BRIEF OF FAIRPOINT COMMUNICATIONS, INC. ET AL.

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FairPoint Communications, Inc., Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint Communications-NNE”), and Northland Telephone Company of Maine, Inc. (“Northland,” together with FairPoint Communications, Inc., and FairPoint Communications-NNE collectively are referred to as “FairPoint”), offer this Brief in support of their Application for Approvals dated February 24, 2010 in the above captioned docket (this “Docket”).

Opening Statement:

At the heart of this Docket is a “Post Filing Regulatory Settlement - New Hampshire”, executed as of February 5, 2010, between the Staff Advocates and FairPoint (the “Regulatory Settlement”) that is the product of extensive negotiation. The parties to the Regulatory Settlement strongly advanced their preferred positions during settlement negotiations and the final settlement resulted in carefully crafted compromises. The Regulatory Settlement provides the framework for a reasonable and timely resolution of the regulatory issues in New Hampshire arising from the Chapter 11 bankruptcy filing by FairPoint. A timely resolution of the bankruptcy case would allow FairPoint to exit bankruptcy with a reduction of its debt in an

amount approaching \$1.70 billion.¹ Approval of the Regulatory Settlement without additional conditions therefore is in the public interest and results in no net harm to the residents of New Hampshire.

The Regulatory Settlement is incorporated in its entirety in the Plan of Reorganization now pending before the Bankruptcy Court. The Commission's approval of the Regulatory Settlement as a whole, without modification or condition, is critical to the timely and reasonable emergence of FairPoint from the Chapter 11 bankruptcy proceedings pursuant to a Plan of Reorganization (as amended, the "Plan" or the "Plan of Reorganization") that is viable and in the interest of the parties to these proceedings and to consumers in New Hampshire. If the Regulatory Settlement is not approved as requested and the approvals under RSA 374:30, RSA 369:2 and RSA 369:8, II(b) are not granted as requested, the foundation of the Plan will be undermined and FairPoint's timely and reasonable emergence from Chapter 11 will be seriously jeopardized. The resulting consequences of failure of the Plan of Reorganization to FairPoint, its customers and the parties would be highly detrimental.

Accordingly, for these reasons and the reasons stated below, FairPoint urges the Commission to (1) determine pursuant to RSA 369:8, II(b) that the change in control of FairPoint Communications, Inc., as the parent company of FairPoint Communications-NNE and Northland, will not have an adverse effect on the public utility rates, terms, service or operation of FairPoint Communications-NNE or Northland within New Hampshire; (2) to the extent that RSA 374:30 is applicable, make a finding that the change in control of FairPoint will be for the public good and approve and authorize the same; (3) approve the Regulatory Settlement as a whole, as presented, without modification or condition, and incorporate its terms in the

¹ See Exhibit FP-22. See also, Exhibit FP-17 at 18 (sub-section entitled "The Plan Term Sheet").

Approval; (4) modify Order No. 24,823 dated February 25, 2008 in DT 07-011 (“2008 Order”) as necessary to implement the terms of the Regulatory Settlement; and (5) approve the pledge to the secured lenders of the membership interests that FairPoint Communications-NNE holds beneficially and of record in its subsidiary, Telephone Operating Company of Vermont LLC (“Vermont Telco”).

I. Introduction

In the 2008 Order, the Commission approved, subject to various conditions, the transaction by which FairPoint acquired all of the landline telephone assets in the State of New Hampshire of Verizon New England Inc. The 2008 Order approved with modifications the Joint Settlement among the Joint Petitioners and the Commission Staff, dated as of January 23, 2008 (the “2008 Settlement”). As noted in the 2008 Order, the transaction was accomplished through FairPoint’s incurrence of a significant level of debt. At the same time, it was anticipated that cash flow from the company’s operations and other measures² would allow it to reduce its debt and to achieve the improvements to service quality and expansion in the availability of broadband. The merger transaction closed on March 31, 2008.

Following the acquisition, FairPoint faced a number of operational challenges including, among other things, (i) integrating the Northern New England operations with pre-merger FairPoint, (ii) keeping pace with competition from bundled offerings by cable companies, as well as the use of alternative technologies, which are eroding FairPoint’s traditional base of wireline voice customers, (iii) monitoring, repairing and upgrading the existing telecommunications network in the Northern New England operations, while simultaneously building a new next generation IP based network, and (iv) transitioning certain back-office functions from Verizon’s

² See Exhibit FP-1 at 60.

integrated systems to newly created systems of FairPoint (the “Cutover”), which occurred in January 2009.³ During this same period, the U.S. entered into the most significant economic decline since the Great Depression, reducing consumer and business spending, and accelerating the rate of decline in access lines and overdue accounts receivable balances from customers.⁴ Turmoil in the financial markets accompanying the economic downturn, coupled with FairPoint’s deteriorating financial performance, restricted FairPoint’s ability to refinance its debt.⁵ As a result of all of these factors, FairPoint was unable to achieve the financial performance projected at the time of the Verizon acquisition and, ultimately, unable to service the approximately \$2.7 billion in debt obligations that it had undertaken to complete the acquisition.⁶

On October 26, 2009, FairPoint and its subsidiaries filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Throughout the bankruptcy process, FairPoint has sought to work closely with representatives of their secured and unsecured creditors, state regulators, as well as with representatives of the collective bargaining units representing large portions of FairPoint’s workforce, to ensure that the process would not cause any undue harm to FairPoint’s customers and employees. On February 8, 2010, FairPoint filed a Plan of Reorganization with the United States Bankruptcy Court.⁷

³ Exhibit FP-7P at 6.

⁴ *Id.* at 6-7.

⁵ *Id.* at 7.

⁶ *Id.*

⁷ The First Amended Joint Plan of Reorganization and the Amended Disclosure Statement for the Debtors’ First Amended Joint Plan of Reorganization, both dated February 11, 2010, were appended to the Application filed on March 5, 2010. FairPoint has subsequently updated the record in this proceeding as follows: The Debtors’ Second Amended Joint Plan of Reorganization (Exhibit FP-16) and Debtors’ Second Amended Disclosure Statement (Exhibit FP-17), both dated March 10, 2010, were filed on March 19, 2010; the Plan Supplement to

Immediately prior to the filing of the Plan of Reorganization, FairPoint finalized the Regulatory Settlement with the Commission's Staff Advocates. Although the Staff Advocates do not have authority to bind the Commission, the Regulatory Settlement was entered into with an understanding that approval of its terms, without further conditions, was in the public interest, and that the Staff Advocates would recommend approval of the Regulatory Settlement to the Commission - which they have done.⁸

Approval of the Regulatory Settlement and corresponding regulatory settlements in Vermont and Maine will enable FairPoint to (i) emerge from bankruptcy pursuant to the Plan of Reorganization, which incorporates the vast majority of the regulatory commitments previously made by FairPoint (ii) avoid protracted bankruptcy litigation and (iii) reduce its debt by \$1.70 billion. Accordingly, on February 24, 2010, FairPoint filed with the Commission a petition seeking approval of (i) the Regulatory Settlement, (ii) any change of control resulting from the Plan of Reorganization, (iii) any necessary modifications to the 2008 Order that result from the Plan of Reorganization and (iv) the pledge of the membership interests of Vermont Telco. Shortly after, on March 11, 2010, Kathryn Bailey pre-filed testimony on behalf of the Staff Advocates in which she concluded that:

FairPoint's plan for reorganization will provide FairPoint another opportunity to complete the commitments it made to the State of New Hampshire. The Regulatory Settlement preserves FairPoint's capital expenditure commitments, its broadband deployment commitments and its quality of service commitments and leaves unchanged its commitments to wholesale providers. For these reasons, based on the information available to me, I recommend

Debtors' Plan of Reorganization, dated April 23, 2010, was filed on April 26, 2010; and the First Supplement to the Plan of Reorganization with the Modified Credit Agreement (Item 7 to the Plan Supplement) (together Exhibit FP-18), and the Debtors' Modified Second Amended Plan of Reorganization (Exhibit FP-19), were filed on May 11, 2010.

⁸ Exhibit Staff Adv.-1 at 12. *See generally*, Exhibit Staff Adv.-2P and 2C

the Commission approve the Regulatory Settlement and the change of control.⁹

The Regulatory Settlement preserves the vast majority of the conditions of the merger approval included in the 2008 Order. In doing so, the Regulatory Settlement preserves the core, central features of the 2008 Order, such as service quality and the basic commitment for broadband buildout, as noted in Ms. Bailey's pre-filed testimony.¹⁰ While the emphasis on specific issues varies among the three state Regulatory Settlements, the terms of these regulatory commitments balanced the state-specific needs of the ratepayers and FairPoint within each state and overall.

Timely approval of the Regulatory Settlement by the Commission and the Bankruptcy Court's approval of the Plan of Reorganization will allow FairPoint to resume operations, without the limitations and uncertainty that will continue to exist as long as it remains under Chapter 11 bankruptcy protection. Among other things, FairPoint will be able to immediately increase the focus of its resources and management experience on continuing to improve service quality and deploying broadband. As FairPoint's witnesses have emphasized, it is imperative that the Commission's approval not impose supplemental conditions beyond those agreed to in the Regulatory Settlement. If approvals are not obtained for the Plan of Reorganization and the Regulatory Settlement as presented, there is a substantial risk that the bankruptcy proceeding will be prolonged and that a litigated result in the Bankruptcy Court will not be as favorable to consumer interests as that presented in the Regulatory Settlement. As discussed further below in Section IV(E) of this Brief, it is important that the Commission approve the Regulatory Settlement in its entirety, as a whole, and without conditions.

⁹ Exhibit Staff Adv.-1 at 12.

¹⁰ *Id.* at 2-3.

II. Standard of Review

A. Reorganization Approval

In its Application, FairPoint requested that the Commission determine pursuant to RSA 369:8, II(b) that the change in control of FairPoint Communications, Inc., as parent company of FairPoint Communications-NNE and Northland “will not have an adverse effect on the rates, terms, service or operation” of FairPoint Communications-NNE or Northland within New Hampshire.¹¹ In its Order of Notice dated February 26, 2010, the Commission raised the question of whether the reorganization is also governed by RSA 374:30, or other statutes.¹² RSA 374:30 requires a determination that the transaction will be “for the public good.” FairPoint respectfully submits that the change of control merits approval under either statute.

A public good determination requires the Commission to find that the transaction is not forbidden by law and is reasonable under the circumstances of the case.¹³ If a corporation’s actions with respect to its property are reasonable, then they are also for the public good.¹⁴ This statutory test is, in essence, a “no net harm” standard.¹⁵ Under the “no net harm test,” the Commission must approve the proposed transaction if the public interest is “not adversely affected.”¹⁶ This obligation requires the Commission to balance the interests of ratepayers against the right of shareholders to be free of regulation which unreasonably restrains legitimate

¹¹ RSA 369:8, II(b)(1).

¹² Order of Notice at 3.

¹³ *Appeal of Easton*, 125 N.H. 205, 212 (1984); *Grafton County Electric Light & Power Co.*, 77 N.H. 539 (1915).

¹⁴ *Id.* See also *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606-614 (1986).

¹⁵ See *Re New England Power Company*, DR 97-251, 83 NH PUC 392, 397 (1998).

¹⁶ *New England Electric System*, DE 99-035, 84 NH PUC 502, 510 (1999) (citing *Re CCI Telecommunications of N.H., Inc.*, 81 NH PUC 844, 845 (1996) (“In essence, the ‘no net harm’ test requires approval of a proposed transaction if the public interest is not adversely affected.”)).

corporate activities.¹⁷ Consequently, in assessing those risks and benefits to determine the overall effect on the public interest, the Commission must approve the transaction if its effect “is at worst neutral from the public interest perspective.”¹⁸

The Commission has also considered in certain of its decisions whether to apply a “net benefits” test in determining the public good.¹⁹ To the extent that such a test applies and that such a test imposes a more stringent legal standard, the issuance of the necessary approvals to enable New Hampshire’s primary telecommunications provider to emerge from bankruptcy clearly meets this test as well.

B. Amending a Prior Commission Order

RSA 365:28 provides that “at any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it.” The Commission’s authority under this statute is broad, and is limited only in that the modifications must meet the requirements of due process and be legally correct.²⁰

C. Mortgaging Utility Property

FairPoint also requests approval for FairPoint Communications-NNE to pledge its membership interests in Vermont Telco to secure the debts of FairPoint Communications, Inc. RSA 369:2 provides that “a public utility may, with the approval of the commission but not otherwise, mortgage its present and future property, tangible and intangible including franchises, to secure the payment of its bonds or notes, including any bonds or notes to be thereafter issued

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See, e.g.,* 2008 Order (Exhibit FP-1) at 38-39.

²⁰ *Appeal of Office of Consumer Advocate*, 134 NH 651 (1991).

under the provisions of such mortgage . . .” It is unclear whether this statute was intended to apply to non-utility assets such as the membership interests in Vermont Telco and whether such interests are New Hampshire property. In addition, the debt being secured is that of the parent entity, and does not consist of the bonds or notes of the regulated utility.

Nonetheless, FairPoint recognizes that the Commission has, on at least one occasion, held that stock in a telecommunications company is property for purposes of RSA 369:2.²¹ Therefore, to the extent that this statute is applicable, which FairPoint does not concede, FairPoint Communications-NNE is seeking approval for the pledge of the membership interests in Vermont Telco to the secured lenders of the parent entity. In making its determination, the Commission also applies a “public good” standard.²²

III. The Plan of Reorganization and the Regulatory Settlement

A. Description of the Plan of Reorganization

Under the Plan of Reorganization, which has been approved by FairPoint’s creditors, the claims of secured lenders under the prepetition secured credit agreement, which aggregate approximately \$2.1 billion, will be satisfied by: (i) a pro rata share of new term loans in the aggregate principal amount of \$1 billion, (ii) a pro rata share of cash in an amount equal to all cash of FairPoint on the effective date of the Plan of Reorganization (the “Effective Date”) in excess of \$40 million after taking into account cash payments required to be paid under the Plan on or after the Effective Date, including amounts paid or reserved for specified bankruptcy claims and expenses, and (iii) a pro rata share of 47,241,436 shares of the new common stock in the reorganized FairPoint Communications, Inc. The prepetition unsecured claimants (whose

²¹ *MFS Communications Co., Inc.*, 80 N.H. P.U.C. 298 (1995) (“We find that this arrangement falls within the provisions of RSA 369:2 regarding mortgaging of tangible and intangible property.”).

²² *Appeal of Easton*, 125 N.H. 205 (1984).

claims aggregate \$635.3 million) will receive their pro rata share of 4,203,352 shares of the new common stock of reorganized FairPoint Communications, Inc. together with warrants for the purchase of an additional 7,164,804 shares (subject in each case to the issuance of securities pursuant to the reorganized FairPoint long term incentive plan). Unsecured claims of \$10,000 or less will be honored in full under the Plan of Reorganization. The claims of subordinated creditors of FairPoint Communications, Inc. will receive no distributions under the Plan of Reorganization, and all of the shares of stock of FairPoint Communications, Inc. outstanding as of the Chapter 11 filing will be cancelled and the holders thereof will receive no payment or distribution.

Under the Plan of Reorganization, allowed unsecured claims of creditors of FairPoint Communications-NNE and Northland will be honored in full. Following the Effective Date of the Plan of Reorganization, the total debt of FairPoint will be reduced from approximately \$2.7 billion as of the Chapter 11 filing date to approximately \$1 billion, providing FairPoint with a very significant improvement in financial strength and flexibility.²³ Annual interest costs will be reduced by approximately 69% from approximately \$208 million to approximately \$65 million and total leverage will be reduced from approximately 7.5x to approximately 2.7x adjusted operating EBITDAR.²⁴ The Plan of Reorganization also contemplates that FairPoint will enter into a new \$75 million revolving credit facility. In furtherance of the Plan of Reorganization, FairPoint Communications-NNE and Vermont Telco have reached agreement with union representatives evidenced by the 2010 Memorandum of Understanding, attached as Exhibit B to the Plan of Reorganization.

²³ Exhibit FP-7P at 31.

²⁴ *Id.* at 31-32.

Based on the current make-up of holders of FairPoint's secured indebtedness, FairPoint expects that one entity, Silver Oak Capital LLC ("Silver Oak"), will have an ownership interest of 10% or more of FairPoint's common stock upon the effectiveness of the Plan of Reorganization.²⁵ Accordingly, implementation of the Plan of Reorganization may result in a "restructuring" or "acquisition" under RSA 369:8 and/or a "transfer" under RSA 374:30. However, FairPoint does not anticipate that either Silver Oak or any holder of equity in the reorganized FairPoint will have a controlling interest in the company.²⁶ Thus, the Applicants request approval of any restructuring, acquisition or transfer that takes place as a result of the Plan of Reorganization.

It is important to emphasize that notwithstanding the 10% or greater interest held by Silver Oak (or by any other entity that might hold 10% or more of the common stock of FairPoint on the effective date of the Plan of Reorganization), no single investor will be in a position to control the company. Decisions with respect to Company policy will be made by a new Board of Directors which, at emergence, will be diverse and independent. The initial term as directors will continue until the first Annual Meeting of Shareholders following the one-year anniversary of the effective date of the reorganization.²⁷ Thereafter, the Board of Directors will be subject to re-election annually by FairPoint's shareholders. The Board members will continually change from time to time because the common stock will be traded in the public markets.²⁸

²⁵ Tr. May 24, 2010 at 31. It should be noted that Silver Oak is a nominee entity and holder of record of various interests and investments managed by Angelo, Gordon & Co., L.P.

²⁶ Tr. May 24, 2010 at 32.

²⁷ *Id.* at 29 – 32.

²⁸ *Id.*

The Plan of Reorganization is of great benefit to New Hampshire ratepayers and is in the public interest. Pursuant to the Plan of Reorganization, FairPoint Communications, Inc. will reduce its indebtedness by approximately \$1.7 billion. The debt restructuring will strengthen the financial health of FairPoint, and thereby strengthen its ability to meet expenses and finance investments so as to improve and enhance the services available to customers and provide them at competitive prices. For example, upon emergence from bankruptcy, FairPoint's key financial metrics will be in line with a "BB" rated company and improve to an investment grade (BBB) rated company by the 2011-2012 time frame.²⁹ The reduction of FairPoint's debt service requirements will provide ample liquidity and financial flexibility to insure that all of FairPoint's capital expenditure requirements and operating expenditure requirements are met in the future.³⁰ Notably, these benefits will inure to retail and wholesale customers.

It is critical to FairPoint, to its retail and wholesale customers, and to its future investors that the Chapter 11 proceedings be brought to a conclusion in accordance with the terms of the Plan of Reorganization and the Regulatory Settlement. The ability of FairPoint to restructure its debt and improve its balance sheet in the next few months pursuant to the Plan of Reorganization is exceedingly important to the long term health of the company and to its ability to continue to expand communication services to customers and businesses throughout the State of New Hampshire specifically and Northern New England generally.

B. Description of the Regulatory Settlement

During the course of the Chapter 11 bankruptcy proceedings, FairPoint engaged in discussions and negotiations with key representatives of the State of New Hampshire, *i.e.*, the Staff Advocates, who were authorized to negotiate a settlement for recommendation to the

²⁹ Exhibit FP-7P at 46.

³⁰ *Id.* at 49.

Commission. As a result of these negotiations, a Regulatory Settlement was reached with the Staff Advocates. This Regulatory Settlement was attached as an exhibit to and incorporated into the Plan of Reorganization. With respect to any concern that FairPoint might attempt to change the Regulatory Settlement, it should be noted that the record of the Phase I Confirmation Hearing in the Bankruptcy Court proceedings has closed³¹ and FairPoint's President testified before this Commission that the company does not intend to request that the Bankruptcy Court reject any portion of the Regulatory Settlement between the date of the evidentiary hearing in this Docket and the effective date of the Plan of Reorganization.³²

Pursuant to the Regulatory Settlement, FairPoint has agreed that following the "Effective Date" of the Plan of Reorganization, FairPoint will comply with the 2008 Merger Order, and the 2008 Settlement, including provisions regarding broadband buildout, capital investment, the Service Quality Index ("SQI") program, the PAP and other provisions of the 2008 Order, subject to modifications described in the Regulatory Settlement and applicable bankruptcy law. As Ms. Bailey testified, the Regulatory Settlement preserves the bulk of the merger conditions.³³

Sections 2.1 - 2.3 of the Regulatory Settlement set forth clarifications and modifications regarding service quality. The emphasis is on providing a framework for continued improvement in service quality. Service quality penalties for 2009 will be deferred, and if FairPoint Communications-NNE meets specified service levels, the 2009 penalties will be waived in whole or in part. Service quality requirements and penalties for 2010 and subsequent years remain in effect. Service quality provisions regarding broadband are clarified, and the maximum total annual liability for service quality penalties is set at \$12.5 million.

³¹ Exhibit FP-29 at 2

³² Tr. May 25, 2010 P.M. at 60-61.

³³ Exhibit Staff Adv.-1 at 12.

Under Section 2.4 of the Regulatory Settlement, pricing obligations regarding stand-alone DSL service would terminate on April 1, 2011, but FairPoint Communications-NNE would continue to honor the Verizon “for life” pricing.

Sections 2.5.1 - 2.5.5 of the Regulatory Settlement retarget broadband build-out commitments scheduled for April 1, 2010, to December 31, 2010, and provide further clarification and specificity to broadband and capital investment requirements to achieve the benefits for customers under the 2008 Settlement and the 2008 Order. Section 2.6 of the Regulatory Settlement sets forth terms under which broadband build-out requirements can be satisfied with resold service, and Section 2.7 provides for the disposition of broadband penalty payments.

Section 3 of the Regulatory Settlement recognizes that certain financial conditions of the 2008 Settlement and the 2008 Order will be satisfied or rendered moot by the substantial debt reductions resulting from the Plan and are no longer applicable.

Section 4 of the Regulatory Settlement includes provisions regarding corporate governance of FairPoint after the effectiveness of the Plan, as well as FairPoint’s undertaking to reimburse the State of New Hampshire for its costs and expenses in the bankruptcy case. It further prohibits FairPoint from agreeing to terms with Maine or Vermont which in the aggregate would be materially more beneficial than those agreed upon with New Hampshire without first offering such terms to the Staff Advocates for New Hampshire. In addition, during the first two years following the effectiveness of the Plan, FairPoint is barred from paying dividends if FairPoint is in material breach of the Regulatory Settlement.

The Regulatory Settlement is a carefully drafted settlement among parties with critical interests and differing views. There is a rationale for each provision, but the overall rationale

and justification for the Regulatory Settlement is also found in the fact that it represents a compromise among competing interests, reflecting the mutual goal of all the parties that FairPoint emerge from Chapter 11 as soon as possible and in a reasonable manner. It avoids the uncertainty of potential litigation in the Bankruptcy Court over whether the various requirements and penalties constitute “claims” subject to discharge or “executory contracts” subject to rejection under bankruptcy laws. Therefore, while FairPoint has addressed individual terms of the Regulatory Settlement in these proceedings, it is essential to emphasize the need for approval of the Regulatory Settlement as a whole and without conditions.

IV. Discussion

Many issues were raised by parties in this proceeding related to FairPoint’s past performance. While FairPoint does not believe that these issues are relevant to the central inquiry as to whether the approvals requested in this Docket should be granted that will enable FairPoint to emerge from bankruptcy, FairPoint does understand that its performance with regard to service quality, broadband expansion and network investment is of central importance to the Commission. To the extent such issues are not appropriate to be addressed in this particular proceeding, FairPoint remains ready to work with the parties and the Commission to continue to address these issues.

FairPoint believes that the fundamental issues in this proceeding are (i) whether any resulting change of control is consistent with the public good, (ii) whether the Regulatory Settlement is “just and reasonable and serves the public interest,”³⁴ (iii) whether the proposed modifications to Commission Orders are legally correct and (iv) whether the pledge of the Vermont Telco membership interests is consistent with the public good. FairPoint believes that

³⁴ Rule Puc 203.20(b).

the answers to questions (i) and (iv) - regarding the change in control and the pledge of the Vermont Telco interests - are in the affirmative, given the tremendous benefits of the Plan of Reorganization, particularly the \$1.7 billion debt reduction. FairPoint also believes the answer to the second question can also be answered in the affirmative because the Regulatory Settlement represents a reasonable resolution of the issues it addresses, preserves the core of the 2008 Order and conditions, and provides a foundation on which FairPoint can emerge from Chapter 11. Finally, FairPoint believes the answer to the third question also is in the affirmative. The modifications required to the 2008 Order are lawful, not only because each has its own reasonable basis, but also because it is an integral part of an overall plan that allows FairPoint to emerge from Chapter 11 soon and pursuant to a Plan of Reorganization that is financially viable.

A. The Negotiated Settlement Preserves FairPoint's Service Quality Commitments

FairPoint actively sought to achieve modifications to its regulatory obligations in each of the three Northern New England states that would reduce its cost of operations and provide additional flexibilities moving forward in order to allow it to operate in a successful manner following its emergence from bankruptcy. The Regulatory Settlement essentially preserves the service quality commitments included in the 2008 Order.³⁵ At the same time, the agreement strikes an appropriate balance between requiring FairPoint to pay for failures to achieve prescribed service quality metrics, and requiring the company to reinvest portions of any such payments into its operations so it can improve any failings going forward. FairPoint has faced significant challenges in the area of service quality since its completion of the Verizon acquisition. These challenges included integrating the Northern New England operations with pre-merger FairPoint, monitoring, repairing and upgrading the existing telecommunications

³⁵ Exhibit Staff Adv.-1 at 12.

network in the Northern New England operations, while simultaneously building a new next generation IP based network and transitioning certain back-office functions from Verizon's integrated systems to newly created systems of FairPoint, (i.e., "Cutover").³⁶ However, moving forward, FairPoint is well positioned to manage its operations and to provide quality service. In particular, as discussed in greater detail below, the company will have dramatically decreased its debt load as a result of its restructuring, providing it with cash flow and flexibility necessary to meet its service commitments.³⁷

In the area of operations, Mr. Allen testified that the system conversion is now largely complete.³⁸ As result, FairPoint's performance on the SQI metrics continues to demonstrate substantial improvement, and every indication is that this trend will continue.³⁹

FairPoint provided extensive and detailed testimony demonstrating the extraordinary effort that it has undertaken to improve customer service. Kathleen McLean, FairPoint's Chief Information Officer, and Vickie Weatherwax, FairPoint's Vice President of Internal Business Solutions, described the substantial steps taken by FairPoint's Information Technology ("IT") organization to improve the operation of FairPoint's systems and related business processes. They provided a detailed overview of the work that has been done to date on FairPoint's systems and the work of the company's Internal Business Solutions ("IBS") organization.⁴⁰ Of particular significance, Ms. Weatherwax and Ms. McLean described the Customer Delivery Improvement Program ("CDIP") developed through this effort.⁴¹ Further, they described the processes that

³⁶ Exhibit FP-7P at 6.

³⁷ *Id.* at 36.

³⁸ Tr. May 24, 2010 at 186.

³⁹ Exhibit FP-8P at 9.

⁴⁰ Exhibit FP-12P at 3-14.

⁴¹ *Id.* at 6-14.

FairPoint uses to improve the operation of its systems, as well as an overview of the work involved in developing and deploying enhancements and the more than 3,000 enhancements that FairPoint has deployed since July, 2009.⁴² Their testimony demonstrates that the projects and processes provide a comprehensive direction and a sound, integrated plan, and that FairPoint is following that plan. These sets of actions and plans, with appropriate checks and balances, demonstrate FairPoint's managerial and technical competence to deliver necessary system changes. Ms. McLean was able to offer the perspective from her experience, having served as a senior officer in the Verizon IT organization.⁴³

Bryan Lamphere, FairPoint's Director of Engineering and Operations Systems Support, provided detailed testimony regarding FairPoint's initiatives to improve provisioning, increase order flow-through and reduce the number of late orders.⁴⁴ He described root-cause analysis of late orders, reduction of FairPoint's late-order backlog and improved processes for the manual handling of orders that have "fallen out" of its systems, including improved management of "queues" containing the orders that need to be handled through manual processes.⁴⁵ He also described the successful establishment, operation, and coordination of FairPoint's Business Architecture Team, Root Cause Analysis Team, Order Management Team, and Continuous Improvement Team to address these issues.⁴⁶ Mr. Lamphere's testimony demonstrates that FairPoint's management and executive staff have the required experience and ability to deal with the remaining cutover issues and also run and build the business. The company has not hesitated to make changes in its organization when it would allow it to serve customers more effectively.

⁴² *Id.* at 4-5

⁴³ Tr. May 25, 2010 A.M. at 8-9.

⁴⁴ Exhibit FP-11 at 2-3.

⁴⁵ *Id.* at 6-8.

⁴⁶ *Id.* at 3-5.

It has created new processes where appropriate, dedicated teams to a project when necessary, and sought outside support from consultants such as Accenture when additional expertise would enhance its internal expertise. FairPoint's flexible and proactive approach to dealing with these issues demonstrates its commitment and ability to deliver the services and service-quality its customers' desire and expect.

Thomas Nolting, FairPoint's Vice President of Billing and Revenue Assurance, described the actions taken and plans adopted by FairPoint's management to identify and correct data inconsistencies in FairPoint's network and systems, arising largely as a result of the cutover to new FairPoint systems from Verizon systems.⁴⁷ He also described the Switch-to-Bill Audit along with its positive benefits for the company and customers, and the recent initiative by its Revenue Assurance team, with the help of an outside consultant, to identify and synchronize inconsistent data across various FairPoint systems.⁴⁸ Through these processes, FairPoint's systems now more accurately invoice customers, and its bill reviews and expanding systemic audits provide a much more robust, proactive approach for identifying, diagnosing, and categorizing any billing errors that do occur.⁴⁹

With respect to wholesale matters, Richard Murtha, FairPoint's Vice President of Wholesale Operations, described the company's continued focus on addressing the concerns of competitive local exchange carrier ("CLEC") customers.⁵⁰ He provided an update on the status of the improvements the company has made in the systems and procedures for serving wholesale customers and discussed (i) the wholesale customer user forums that FairPoint held in September 2009, (ii) the development of a specific task list to address the systems issues that were raised at

⁴⁷ Exhibit FP-9 at 3-6.

⁴⁸ *Id.* at 6-19.

⁴⁹ *Id.* at 7.

⁵⁰ Exhibit FP-10 at 2-3.

these forums, and (iii) FairPoint's progress in accomplishing these tasks.⁵¹ The company has received several favorable comments from some of its wholesale customers, but recognizes the need to further improve in the delivery of services to FairPoint's wholesale customers.⁵²

It is important to note at this point that the Regulatory Settlement, in its preservation of the bulk of the provisions of the 2008 Order, makes no changes to FairPoint's obligations and commitments to wholesale customers in the 2008 Order or under law, subject to applicable bankruptcy law. Furthermore, with respect to the bankruptcy proceedings, FairPoint's Plan Supplement, which was filed on April 23, 2010, evidences FairPoint's intention not to reject wholesale agreements with competitive local exchange carriers, e.g. Section 252 interconnection agreements, wholesale tariffs, "commercial agreements" such as Wholesale Advantage Agreements or VISTA Agreements, or settlement agreements related to its acquisition of Verizon's assets.⁵³ Although FairPoint's bankruptcy reorganization plan allows for the possibility of further contract rejections, FairPoint does not intend to exercise that right with respect to these agreements with wholesale customers.⁵⁴

Given the substantial impact of service quality on FairPoint's success as it emerges from bankruptcy, it is entirely appropriate that the Regulatory Settlement addresses the company's regulatory commitments in this area. The first service quality-related issue that Regulatory Settlement resolves is the outstanding jurisdictional issue regarding SQI penalties for periods

⁵¹ *Id.* at 3-9.

⁵² *Id.* at 9.

⁵³ Exhibit FP-13 at 7. As Ms. Hood further explained, "this does not necessarily mean that FairPoint has approved any or all claims based on those agreements, and it reserves the right to dispute those claims. Furthermore, FairPoint reserves the right to terminate and/or renegotiate those agreements in accordance with the terms of those agreements, as amended or as modified by other applicable agreements."

⁵⁴ *Id.*

prior to and during the bankruptcy proceeding.⁵⁵ If the Commission does not approve the Regulatory Settlement, the issue will remain unresolved, with the parties having maintained their rights to litigate this issue in the Bankruptcy Court.

The Regulatory Settlement proposes no changes to FairPoint Communications-NNE's wholesale Performance Assurance Plan ("PAP"). FairPoint Witness McLean did point out that some of the metrics included in this plan were linked to Verizon systems or processes that were no longer used.⁵⁶ FairPoint Communications-NNE may, therefore, seek to modify these metrics separately at some future point. As noted, however, FairPoint is not equivocating on the provision of quality customer service to its wholesale customers, and FairPoint Communications-NNE will continue to be subject to the PAP as it moves forward with improvements to its wholesale service quality.⁵⁷

With respect to service quality, FairPoint's commitments therefore are substantially unchanged from those included in the 2008 Order. While FairPoint has made great progress in resolving post-cutover issues, problems continue to exist and improvements and changes remain to be implemented. As demonstrated by the substantial prefiled testimony presented by FairPoint's witnesses and the testimony presented at hearing, the company has more than "turned the corner" by implementing operational improvements necessary to meet its service quality commitments and to achieve ongoing improvement. The success of these initiatives is demonstrated by continuing improvement of the company's performance under its service quality metrics. Under the Regulatory Settlement, FairPoint remains subject to its existing service quality penalty mechanisms, including SQI and PAP.

⁵⁵ Exhibit FP-4 at Section 2.1.

⁵⁶ Tr. May 25, 2010 A.M. at 29-32.

⁵⁷ Tr. May 25, 2010 P.M. at 119.

In short, FairPoint's evidence demonstrates that the approval of the Regulatory Settlement is in the public interest. No benefit could be achieved by rejecting the Regulatory Settlement for the purpose of seeking supplemental conditions relating to service quality in this proceeding. Indeed, of all of the CLECs registered to conduct business in New Hampshire with this Commission, only two (2) produced witnesses to oppose FairPoint's Application in this Docket.⁵⁸ Yet neither witness could articulate any benefit that would arise or accrue related to this Commission's denial of FairPoint's contemplated reorganization and the Regulatory Settlement.⁵⁹ The only other CLEC which produced a witness in this Docket did not oppose FairPoint's requested relief.⁶⁰

B. The Regulatory Settlement Contains Limited Modifications to FairPoint's Broadband Obligations

FairPoint has agreed to adhere to the broadband coverage commitments prescribed in the 2008 Order, subject to the exception that certain broadband build-out commitments with a deadline of April 1, 2010 are extended to December 31, 2010. At the same time, it is important to consider that the Regulatory Settlement preserves the core commitments of FairPoint to expend substantial investment to substantially increase the availability of broadband in its service area on a scope and pace well beyond that of its predecessor. Staff Advocate Bailey testified in detail with regard to the ongoing broadband and capital investment commitments of FairPoint that are retained in the Regulatory Settlement. FairPoint will have the option to resell terrestrial

⁵⁸ See Tr. May 25, 2010 P.M. at 92-94.

⁵⁹ See *id.*

⁶⁰ Tr. May 25, 2010 P.M. at 96. In addition, while One Communications Corp. failed to produce a witness in these proceedings, it filed a Brief requesting a myriad of conditions. Yet One Communications Brief is devoid of a single reference as to what might result in Bankruptcy Court proceedings in the event conditions imposed in this Docket (or the parallel dockets before the Maine Public Utilities Commission and the Vermont Public Service Board) lead to the Plan of Reorganization being rejected or otherwise not confirmed.

(non-satellite) based service providers' broadband service offerings in order to fulfill FairPoint's broadband build out and/or service requirements with respect to the last eight percent (8%) of FairPoint's broadband availability requirements as contained within the 2008 Settlement, provided that the services meet or exceed all requirements of the 2008 Order, and the resold services are purchased through and serviced by FairPoint. Pricing restrictions regarding non-regulated stand-alone DSL service will terminate on April 1, 2011; provided, that FairPoint will continue to honor the "for life" pricing that Verizon had offered to certain customers.

The broadband provisions are justified not only by the economic reasons, but also by the situational need to achieve a compromise in the Regulatory Settlement that provided economic value and business flexibility to the interested parties. The modifications to the broadband commitments are a result of that process, which occurred in all three Northern New England states (but manifested itself differently based on the issues and circumstances in each state). Accordingly, FairPoint urges the Commission to approve and adopt the Regulatory Settlement as a whole in the form presented therein.

As an essential part of its broadband deployment project, FairPoint has been pursuing the engineering, design, construction and deployment of its "next generation network" ("NGN") called "VantagePoint."⁶¹ VantagePoint is FairPoint's network of tomorrow and the core network is largely completed. In the near term, VantagePoint will offer broadband speeds of up to 15 MB/second, compared to maximum speeds of 7 MB/second with the existing ATM network.⁶² The VantagePoint NGN will provide bandwidth that can support an array of new products, such as fiber to the home and other advanced services.⁶³ It will also be designed to be scalable,

⁶¹ Exhibit FP-8P at 23.

⁶² *Id.*

⁶³ *Id.*

providing the capability for bandwidth to be increased quickly to provide products and services to meet future business and residential customer demands.⁶⁴

At the wholesale, institutional and business level, VantagePoint is a carrier class Internet protocol/multi-protocol label switching (“IP/MPLS”) broadband network with Ethernet transport that features a layered and ringed architecture.⁶⁵ Its first layer is a dense wave division multiplexing (“DWDM”) network capable of transporting forty 10-gigabit light path circuits over a pair of fibers.⁶⁶ Radiating from each central office will be one-gigabit subtended access rings terminating in remote terminals.⁶⁷ This structure then provides broadband access from central offices or remote terminals to customers.⁶⁸ Initial roll-out will reach areas previously unequipped for broadband services.⁶⁹

The option to use fixed wireless broadband to meet a small portion of FairPoint’s broadband availability commitment recognizes the ongoing evolution of the broadband industry and, more importantly for purposes of these proceedings, addresses a portion of the cost considerations discussed in detail above, thereby providing a source of support for FairPoint’s success as it emerges from bankruptcy. The provision is modified by requirements that the services meet or exceed all requirements of the 2008 Order, that the resold services are purchased through and serviced by FairPoint, and that the Commission Staff approve the service provider. These conditions ensure that any use of this option will be conducted in a reasonable manner that appropriately advances the goals of expanding broadband availability.

⁶⁴ *Id.*

⁶⁵ Exhibit FP-8P at 23.

⁶⁶ *Id.*

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

⁶⁹ Exhibit FP-8P at 24.

Throughout the continued broadband deployment project, FairPoint will remain subject to detailed reporting requirements, providing data regularly to the Commission in the form required of Verizon pursuant to Section 5 of the 2008 Settlement. Such information was used, for instance, by Mr. Lippold at hearing to provide detailed information regarding progress to date.⁷⁰ The company will continue to provide supplemental and detailed information to the Commission on both a regular basis or as needed, as required by the Commission.

It is also important to note that the revised broadband conditions retain a significant incentive from Section 3.9 of the 2008 Settlement. Notably, to the extent NNE does not meet the broadband availability deadlines, it will be subject to a \$500,000 penalty for each percent by which it has not achieved the broadband availability requirements as provided in Sections 3.1, 3.2 and 3.3 of the 2008 Settlement. To the extent that FairPoint has failed to meet the requirements of Section 3.3 within 60 months following the Closing Date, then the \$500,000 penalty will continue to apply, calculated at 6-month intervals. The first \$500,000 of these penalties is payable to the New Hampshire Telecommunications Planning and Development Fund. Subsequent penalty amounts will be retained by FairPoint which, within three years of the date of the penalty, must invest or expend those penalty amounts in FairPoint's network, *in addition to* any otherwise required capital expenditures. FairPoint submits that this penalty structure is reasonable, as it provides an incentive for FairPoint to meet its broadband commitments and ensures, in the unlikely event that a milestone is missed, that penalty funds are invested into its network to continue to improve and expand the services provided to its customers.

⁷⁰ See, e.g., Tr. May 24, 2010, at 160.

C. FairPoint Will Have Adequate Resources to Render Safe and Reliable Service

When FairPoint emerges from bankruptcy, it will do so in a strong financial position, one that it will allow it to continue, if not accelerate, the pace of improvements to its service offerings and to fulfill its regulatory commitments, including those set forth in the 2008 Order as modified by the Regulatory Settlement. This will result from the substantial restructuring of its debt and other preexisting obligations. Most significantly, FairPoint will have a capital structure that contains significantly less debt. In fact, more than \$1.7 billion, or roughly two-thirds, of its existing debt will be converted into equity.⁷¹ The significant reduction in debt resulting from the restructuring plan will reduce the company's minimum debt service requirements by approximately \$175 million annually.⁷²

Detailed financial projections demonstrating this improved position were presented in the testimony of the Hood-Allieri-Newitt panel.⁷³ These financial projections provide significant cushion both in terms of the financial tests that will be contained in the New Term Loan Agreement as well as from a liquidity perspective.⁷⁴ For example, the projections reflect the repayment of nearly \$350 million of the new \$1 billion Term Loan by the end of 2013.⁷⁵ In addition, the projections reflect the steady build-up of cash to more than \$400 million by the end of 2013.⁷⁶ This cash could be used for a number of purposes, such as further voluntary repayment of debt and/or investment in new projects that are determined to generate a reasonable

⁷¹ Exhibit FP-7P at 3.

⁷² *Id.* at 49.

⁷³ *Id.* at 40-49.

⁷⁴ *Id.* at 51. *See also*, Tr. May 24, 2010 at 90 (Mr. Newitt explaining the scope of the cushion.)

⁷⁵ Exhibit FP-7P at 51.

⁷⁶ *Id.*

economic return.⁷⁷ The build-up of this cash balance to more than \$400 million through cash flow generated from the operations of the business, after giving effect to the \$700 million of capital expenditures contained in the projections, is also reflective of the magnitude of cushion that is contained in the financial projections, should one or more of the assumptions not be realized.⁷⁸

The Staff Advocates also agree that “FairPoint’s business plan provides for growth in revenue and profit margin over the projection period which would result in an entity with favorable projected credit ratings, significant excess cash, reduced debt levels and large differences between projected financial ratios and debt covenants,”⁷⁹ although they admittedly find the business plan “somewhat optimistic.”⁸⁰ Even so, the Staff Advocates note that even in a less optimistic scenario, FairPoint’s debt levels are expected to be reduced and it will still be able to generate excess cash.⁸¹

As a result, FairPoint’s financial position and ongoing liquidity will be substantially strengthened, thus positioning FairPoint as a healthy and viable company in the competitive telecommunications marketplace and providing ample financial flexibility to insure that all of its operating and capital expenditure requirements are met in the future.⁸²

⁷⁷ *Id.*

⁷⁸ *Id.* at 51-52.

⁷⁹ Exhibit Staff Adv.-2 at 25. Mr. Lisciandro reaffirmed his professional opinions during the evidentiary hearing (*see* Tr. May 25, 2010 P.M. at 106) and further noted that certain revisions to FairPoint’s credit agreement provided even further cushion against a possible covenant default thereunder (*Id.* at 106-07, 136).

⁸⁰ Exhibit Staff Adv.-2 at 25.

⁸¹ *Id.*

⁸² Exhibit FP-7P at 3,49.

In addition to the improvements in the financial position of the company, the company's operational risk has been substantially reduced, as demonstrated by the following factors:⁸³

1. The integration of the Northern New England business into FairPoint is essentially complete.
2. The senior management team of the company has been significantly strengthened with the hiring of a number of new highly experienced executives from both inside and outside the telecom industry.
3. The cutover from Verizon's systems to the new FairPoint systems has been completed. The new FairPoint operating systems have been in operation for more than one year, and they are stable. Improvement plans have been developed with the objective of continuing to enhance the efficiency and effectiveness of the new systems and a timetable for implementation has been developed and is underway.
4. The build out of the VantagePoint network is well underway and the roll-out of a new suite of IP based business services is scheduled to begin later this year.

As a result, FairPoint will emerge from Chapter 11 with the financial and operational strength to fulfill its obligations and commitments to the ratepayers of New Hampshire.

D. A Pledge of the Vermont Telco Membership Interests is for the Public Good

FairPoint Communications-NNE holds beneficially and of record membership interests in Vermont Telco. The terms of the negotiated settlement in FairPoint's bankruptcy case with the secured lenders include a pledge of these membership interests. As explained previously in this Brief, the debt reduction reflected in the Plan of Reorganization approved by creditors will result a significant reduction in FairPoint's long term debt. This reduction will have obvious benefits to New Hampshire ratepayers; FairPoint will emerge from bankruptcy as a financially stable company with the resources necessary to meet its regulatory and other obligations in Northern New England.

⁸³ *Id.* at 50.

Furthermore, Vermont Telco provides no telecommunications services to residents of the State of New Hampshire, and these membership interests do not constitute utility assets used to provide telephone service to New Hampshire customers. The pledge of these interests as part of the collateral to secure the post-bankruptcy credit agreement in no way affects the provision of telephone utility service to New Hampshire customers. Therefore, a pledge of these interests, far from posing a threat of harm to ratepayers, will further ensure the benefits that will accrue to them.⁸⁴

E. Failure to Grant the Requested Approvals or to Condition Approval would Present Substantial Risk to Retail and Wholesale Customers

Pursuant to Section 12.1(i) of the Plan of Reorganization, the Plan will not become effective until the following condition is satisfied:

[All] applicable regulatory approvals from the Federal Communications Commission and from state regulatory authorities in certain states in which it operates, including the approval of the change of control applications and the related regulatory settlements, shall have been obtained or FairPoint shall have obtained a ruling from the Bankruptcy Court to the effect that the state regulations requiring such regulatory approvals are pre-empted by the Bankruptcy Code.

The Regulatory Settlement, for which FairPoint now seeks approval, was filed with the U.S. Bankruptcy Court for presentation to FairPoint's creditors and is incorporated into the Plan of Reorganization.

The negotiation of the Plan of Reorganization represented an extraordinary undertaking by numerous parties, and involved substantial concessions by virtually all of them. As noted above, lenders have agreed to reduce the company's debt from \$2.7 billion to just \$1 billion. Representatives of FairPoint's labor unions have executed a Memorandum of Understanding that

⁸⁴ See Exhibit FP-22.

would revise the terms of their collective bargaining agreements. The states of Maine and Vermont have reached similar Regulatory Settlement agreements.

As described in Ms. Bailey's testimony on behalf of the Staff Advocates:

FairPoint's plan for reorganization will provide FairPoint another opportunity to complete the commitments it made to the State of New Hampshire. The Regulatory Settlement preserves FairPoint's capital expenditure commitments, its broadband deployment commitments and its quality of service commitments and leaves unchanged its commitments to wholesale providers. For these reasons, based on the information available to me, I recommend the Commission approve the Regulatory Settlement and the change of control.⁸⁵

As discussed above, approval of the Regulatory Settlement will expedite FairPoint's resumption of operations in a normal manner, without the limitations and uncertainty that will continue to exist as long as it remains under Chapter 11 bankruptcy protection.⁸⁶ The modifications to the New Hampshire merger conditions embodied in the Regulatory Settlement are modest (preserving the overwhelming majority of the provisions of the 2008 Merger Order, the SQI and PAP), are clearly designed to support the company's successful emergence from bankruptcy, and are subject to appropriate conditions. Following FairPoint's emergence from Chapter 11, the Commission will continue to possess all of its enforcement authority to deal with retail and wholesale issues as they arise.

On the other hand, should the Commission seek to modify or impose conditions on its approval of the Regulatory Settlement, such action will undermine the prospects for approval of the Plan of Reorganization. For instance, given the substantial concessions made and the number of parties involved in the Chapter 11 process, including FairPoint's creditors, who are collectively reducing the company's debt obligations by approximately \$1.7 billion in exchange

⁸⁵ Exhibit Staff Adv.-1 at 12.

⁸⁶ The benefits of approval of the Regulatory Settlement in its entirety were summarized by Mr. Skrivan through his adoption of the Pre-Filed Testimony of Mr. Alfred Giammarino, Exhibit FP-7P at 52.

for equity, even a modest modification could be used as a basis for a party to withdraw support for the negotiated plan.⁸⁷ Mr. Giammarino explained the potential harms of the Commission seeking to alter the Regulatory Settlement in pre-filed testimony later adopted by other FairPoint witnesses.⁸⁸ Mr. Skrivan and Peter Nixon explained the potential harms of the Commission seeking to alter the Regulatory Settlement during the hearings. These concerns include issues arising under the most favored nations clauses in the three Regulatory Settlements and issues in the Bankruptcy proceedings, as well as issues with creditors.⁸⁹

In the event that the matter is returned to the Bankruptcy Court for further action, there is no assurance that the provisions negotiated by the Staff Advocates could be preserved. Renewed negotiations may be less successful. In the meantime, FairPoint will be delayed in its emergence from Chapter 11. In an extreme situation, the Bankruptcy Court might impose its own resolution of matters raised in litigation related to the New Hampshire regulatory/merger conditions. For instance, the Regulatory Settlement contemplates a resolution of issues regarding SQI penalties.⁹⁰ If the issues resolved by the Regulatory Settlement are returned to the Court, it is reasonable to anticipate that lenders and other creditors will seek more substantial relief from the New Hampshire regulatory conditions than those provided in the Regulatory Settlement.

Multiple Intervenors in this Docket have requested that the Commission impose additional conditions on FairPoint in connection with the granting of any relief sought by

⁸⁷ Notably, the willingness of FairPoint's creditors to forego approximately \$1.7 billion in debt in exchange for equity in the reorganized FairPoint means that they will have substantial incentive to ensure that the reorganized FairPoint succeeds, as only an increase in the company's value through its share price will enable them to recoup a portion of their losses over time.

⁸⁸ Exhibit FP-7P at 58.

⁸⁹ Tr. May 25, 2010 P.M. at 58.

⁹⁰ Exhibit FP-4 § 2.1.

FairPoint.⁹¹ Even the Non-Advocate Staff's consultants, The Accion Group, proposed conditions.⁹² Yet there was little discussion during the evidentiary hearings by these parties as to the potential ramifications of additional conditions being imposed upon FairPoint. FairPoint submits that no conditions should be imposed in connection with this Docket.

As a first matter, FairPoint believes that the conditions proposed by The Accion Group, in its Supplemental Report, are not necessary. The Regulatory Settlement and the status of the bankruptcy proceedings in relation to the confirmation of the Plan of Reorganization, combined with the Commission's regulatory jurisdiction over FairPoint, adequately addresses the concerns raised by The Accion Group. With respect to the conditions expressed in the Supplemental Report (Exhibit Non-Advocate Staff-3P, at 15), FairPoint offers the following:

- The Commission's Telecommunications Division contains the requisite experience and expertise to monitor FairPoint's operational and financial performance. In addition, Section 4.2 of the Regulatory Settlement requires FairPoint's Board of Directors to appoint a regulatory subcommittee to monitor FairPoint's compliance with the 2008 Order, as modified by the Regulatory Settlement. Thus, the condition in the fifth bullet of the Supplemental Report is not necessary.
- Imposing "conditions" that may be implemented in Maine or Vermont is unnecessary in light of the "most-favored nation" clause in Section 4.5 of the Regulatory Settlement. Thus, the concern raised by the condition in the fourth bullet of the Supplemental Report has been addressed and further "conditions" related to the issue are not warranted.
- The concern raised by the condition in the first and third bullet of the Supplemental Report has been satisfied pursuant FairPoint Exhibit FP-29 and Section 1.4 of the Regulatory Settlement. As noted in Exhibit FP-29, the record regarding the confirmation of Fairpoint's Plan of Reorganization, including feasibility of such plan has been closed, subject only to two very limited topics: the litigation trust to assert claims against Verizon and limited issues related to the Regulatory Settlements. Section 1.4 of the Regulatory Settlement requires that once the "...Commission has approved the Regulatory Settlement and change in control, subject to the Plan subsequently being confirmed, neither party may void the terms of the Settlement or any approval of the change in control."

⁹¹ See e.g., Tr. May 25, 2010 P.M. at 92-93

⁹² Exhibit Non-Advocate Staff-3P and 3C at 15. See also, Tr. May 26, 2010 at 66-69.

- Keeping the evidentiary record open, as suggested in the condition in the second bullet of the Supplemental Report, for a review of FairPoint's financial results through March 31, 2010, could lead to an endless cycle of evidentiary review. Certainly, if FairPoint's financial results through March 31, 2010, are relevant, then the results for the second through the fourth quarter also are relevant. At some point, however, the evidentiary record must close. In addition, it is important that the record be closed so that the procedural schedule recommended pursuant to the Regulatory Settlement Sections 1.3 and 1.4 can be met, including the requested Commission decision on or before June 24, 2010.

Second, Ms. Hood stated succinctly and summarized the potential effects of imposing conditions or otherwise rejecting FairPoint's requested relief when she testified:

In my opinion, if the Regulatory Settlements are not approved in their current form, that would potentially trigger other issues within the overall Plan of Reorganization. The Plan of Reorganization was developed over a period of time, taking into consideration all of the Regulatory Settlements, as well as agreements with our various parties and creditors, as well as the unions. And, the concern would be that, if any portion of the Regulatory Settlements weren't approved, that would require us to revisit other areas in relation to the overall Plan of Reorganization.⁹³

A member of The Accion Group appeared to acknowledge the risk described by Ms. Hood. It is for this reason that "...the [Accion Group's] conditions were limited..."⁹⁴ Ms. Bailey, a member of the Staff Advocates, directly acknowledged this risk when she testified that "... if the Commission did not approve the [Regulatory Settlement] then all of these issues, and all of the issues in the 2008 Agreement, would probably be fought at the Bankruptcy Court."⁹⁵ In summary, the risks of imposing conditions in this Docket and the risks of rejecting the relief requested herein significantly outweigh any conceivable benefit that even a "limited" conditional approval might bring to the ratepayers and wholesale customers of FairPoint in the State of New Hampshire. Arguments to the contrary should be rejected.

⁹³ Tr. May 24, 2010 at 90-91.

⁹⁴ Tr. May 26, 2010 at 72.

⁹⁵ Tr. May 25, 2010 P.M. at 140.

V. Conclusion

WHEREFORE, FairPoint respectfully requests that the Commission issue an Order and:

a. Make a finding pursuant to Puc 203.20 that the Regulatory Settlement is just and reasonable and serves the public interest and approve the same without revisions or conditions;

b. Determine pursuant to RSA 369:8, II(b) that the change in control of FairPoint Communications, Inc., as parent company of FairPoint Communications-NNE and Northland will not have an adverse effect on the public utility rates, terms, service or operation of FairPoint Communications-NNE or Northland within New Hampshire;

c. To the extent applicable, make a finding pursuant to RSA 374:30 that the change in control of FairPoint Communications, Inc., as parent company of FairPoint Communications-NNE and Northland is for the public good and approve and authorize the same;

d. Pursuant to RSA 365:28, approve the modifications to the 2008 Order requested by FairPoint in this Docket;

e. Pursuant to RSA 369:2, approve the pledge by FairPoint Communications-NNE of the membership interests that it holds in Vermont Telco; and

f. Grant such other and further relief as the Commission may determine to be just and reasonable in furtherance of subsections V.a through V.e above.

Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

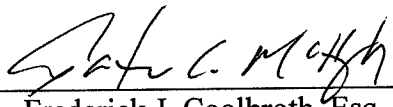
NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC D/B/A FAIRPOINT
COMMUNICATIONS-NNE

NORTHLAND TELEPHONE COMPANY OF
MAINE, INC.

By Their Attorneys

DEVINE, MILLIMET & BRANCH
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