STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

FairPoint Communications — **Request for Approvals in Connection with the Reorganization Plan of FairPoint Communications, Inc., et al.**	**DT 10-025**

POST-HEARING BRIEF OF OTEL TELEKOM, INC.

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Gregory M. Kennan
Of Counsel
Fagelbaum & Heller LLP
20 North Main St., Suite 125
P.O. Box 230
Sherborn, MA 01770
508-318-5611 Tel.
508-318-5612 Fax
508-259-0786 Mob.
gmk@fhllplaw.com

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Summary

Otel Telekom, Inc. ("Otel") respectfully suggests that in order to find that the proposed Regulatory Settlement is just and reasonable and in the public interest, and that the proposed change in control of FairPoint Communications, Inc. will not will not adversely affect rates, terms, service, or operation of its operating subsidiary within New Hampshire, the Commission must impose certain conditions. At a minimum, these include:

Extending the duration of certain conditions in the 2008 Agreement governing FairPoint's relationships with its wholesale customers.

Establishing an escrow to ensure funding of unfinished systems or process remediation projects.

Requiring an independent audit of FairPoint's performance and reporting under the C2C and PAP.

Imposing a time limit on backbilling that does not discriminate between FairPoint's retail and wholesale customers.

Requiring that the role of the independent monitor of cutover, systems, and process issues be continued at FairPoint's expense.

Background

In their petition dated February 24, 2010, FairPoint Communications, Inc., Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE, and Northland Telephone Company of Maine, Inc. (collectively, "FairPoint"), requested approval of a Regulatory Settlement between FairPoint and the Staff Advocates of the New Hampshire Public Utilities Commission ("Staff Advocates").

FairPoint also purported to represent under RSA 369:8, II, that the proposed change in control of FairPoint Communications, Inc., as parent company of FairPoint Communications-NNE (resulting from the conversion of debt issued by FairPoint Communications, Inc. into equity shares of that company) will no have an adverse effect on the rates, terms, service, or operation of FairPoint Communications-NNE within New Hampshire.

Under its rules, the Commission must evaluate the Regulatory Settlement using the "just and reasonable' and "public interest" standards: "The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest." Puc § 203.20(b). In evaluating a settlement under this standard, the Commission "consider[s] all the interests involved and all the circumstances in determining what is reasonable." *In re Verizon New England, Inc., Bell Atlantic Communications, Inc., Nynex Long Distance Co., Verizon Select Services, Inc. And FairPoint Communications, Inc. — Petition for Authority to Transfer Assets and Franchise***,** DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823, at 39 (February 25, 2008) (quoting *In re National Grid plc,* Order No. 27,777 at 68 (citations and internal quotation marks omitted)).

FairPoint cannot show that the Regulatory Settlement is "just and reasonable" or that it "serves the public interest." It also cannot show "no adverse effect" upon rates, terms, conditions, or operations in the state. Its systems and process problems since cutover are notorious. During the post-cutover period, Otel and other CLECs operating in New Hampshire have not received the benefit of the conditions in the 2007-2008 settlements that the Commission approved in allowing the Verizon/FairPoint transaction to proceed. *See* Ex. FP-2. These conditions were designed to produce a period of stability in which CLECs and FairPoint alike could concentrate on running their businesses and serving their customers (the people and businesses of New Hampshire) without distraction from interconnection agreement negotiations, rate litigation, or other disputes.

The anticipated period of stability and focus on normal business activities has not come to pass. Service quality has suffered severely. FairPoint and CLECs alike have had to devote inordinate time and resources just to make things work. Manual workarounds abound for what used to be routine, automated processes. Transactions that formerly flowed through without alteration now must be checked carefully for errors. The efficiency and productivity losses to CLECs have been substantial, and CLECs have had to increase their personnel resources to perform these functions. Costs have risen as a result. Also, CLECs have devoted and will continue to devote significant time and resources to meetings, conference calls, user groups, workshops, and forums, so as to help FairPoint remedy its myriad systems and process deficiencies.

Poor service quality has damaged CLECs in terms of their reputations and in terms of time, effort, and money expended. Further, to the extent that service failures or deficiencies have caused FairPoint or CLEC customers to obtain service from cable companies or other alternative service providers that do not use FairPoint's network, both FairPoint and the CLECs have lost competitive ground to those other competitors.

In order to find that the standards set forth above are satisfied, the Commission should require FairPoint to live up to the commitments it made when it took over operations in New Hampshire, but did not deliver on, by extending the duration of the conditions in the 2008 settlements. In addition, the Commission should require an immediate audit of the C2C/PAP metrics — already required under the 2008 Agreement — to ensure that the those metrics and the reports that depend on them accurately reflect FairPoint's service quality results. FairPoint's systems failures also point out the need to maintain the independent monitor overseeing FairPoint's cutover remediation efforts, and to impose other conditions as well. These are detailed below.

Discussion

I. The Commission Should Extend the Conditions in the 2007-2008 Settlement Agreements for an Additional Five Years.

A. FairPoint's Systems and Process Issues Have Had and Will Continue to Have Adverse Effects on the Rates, Terms, and Conditions of Service in New Hampshire.

The evidence regarding the problems in FairPoint's systems and processes is extensive and essentially uncontradicted. These problems have had major and ongoing adverse effects on the rates, terms, and conditions of FairPoint's service to its wholesale customers. They have reduced wholesale customers' productivity and increased their costs. The problems also have had discriminatory and/or anticompetitive effects.

1. FairPoint's Problems Have Caused CLECs to Experience Increased Costs and Reduced Productivity.

FairPoint's systems problems since cutover are notorious. They have been so serious that FairPoint blames them in large part for its financial plight and current bankruptcy. Ex. FP-7 (Giammarino Prefiled[1]) at 7-8. FairPoint has deployed some 500 systems changes per month since July 2009. Day 2 a.m. Tr. at 14. Despite that, the systems remain plagued with problems.

The problems have required both FairPoint and its wholesale customers to develop manual workarounds. As FairPoint acknowledges, manual processes are time-intensive. Day 2 A.M. Tr. at 19. Consequently, CLECs like BayRing have had to increase provisioning and repair department staffs. Ex. BR-1 (Wilusz Prefiled) at 14. Such staff increases have resulted in higher costs of doing business. *Id.* at 16.

Performing these manual functions reduces the productivity of billing, customer care and sales staff. For example, SegTEL's Kath Mulholland testified that FairPoint's inability to track LSR and ASR service orders led FairPoint to suggest a more "proactive" solution. This involved segTEL's spending two to three hours a day checking the status of every order, putting the update on a spreadsheet, and providing it to segTEL's account manager and single point of contact (SPOC) at FairPoint. Ex. SegTEL-1 (Mullholand Prefiled) at 12-13. This produced few results, and segTEL abandoned the process. "After about a month, we determined that the amount of hours we were expending were not creating any solutions . . . . It simply is not cost effective for us to monitor FairPoint's progress." *Id.* at 13.

[1] Mr. Giammarino has left the company and other FairPoint witnesses have adopted portions of his prefiled testimony. For convenience of citation, this brief will cite to the original Giammarino prefiled testimony dated February 24, 2010.

Similarly, Ed Tisdale of CRC Communications and Mid-Maine Communications described weekly (now bi-weekly) meetings with FairPoint to address billing issues. "These meetings are regularly attended by me and 3 members of my staff . . . ." Ex. CRC-2 at 3. While FairPoint has acknowledged the validity of CRC's concerns and claims, and both sides have worked hard to resolve the issues, FairPoint has been unable to implement permanent solutions to the problems. "FairPoint's inability to make permanent fixes or to get long-standing issues addressed causes frustration for both FairPoint and CRC because it means that the same billing errors reoccur month after month, generating a continued need for our biweekly meetings and significant manual work by both sides." *Id.*

Mr. Tisdale described how CRC is forced to manually review bills for consistently recurring problems, such as failing to apply the resale discount on resold lines (*id.* at 4), overcharging retail rather than wholesale rates for trouble tickets (*id.* at 5), taxes and surcharges (*id.*), and ensuring that FairPoint stops charging for disconnected circuits (*id.* at 5-6). As a result:

> We have devoted, and continue to devote, significant man-hours to manually reviewing the many monthly bills we receive from FairPoint, researching correct charges, submitting curative paperwork to FairPoint, and keeping track of the various claims to make sure all are accepted and properly reflected on future bills. The employees involved come from various departments within our companies, as detailed knowledge of the specific services is required, thus disrupting normal functioning throughout our operations.

Id. at 7-8.

CLECs also have had to expend substantial time and effort assisting FairPoint in solving its systems and process problems. Around the time of cutover, FairPoint held daily conference calls at which CLECs reported cutover issues to FairPoint. Ex. SegTEL-1 at 3. At the hearing, FairPoint's Richard Murtha described numerous different conference calls and meetings CLECs have attended in an effort to get FairPoint's systems to work properly. There is a bi-weekly call with the CLEC community typically attended by 30-40 CLEC representatives. Day 1 Tr. at 219. On these calls, CLECs can bring to FairPoint's attention problems they have encountered. *Id.* at 220. Another monthly call, the Wholesale Users Forum, provides another opportunity for CLECs to assist FairPoint in resolving problems. *Id.* at 221.

Another prime example is the CLEC meetings held last September in Portland, Maine. The meetings took place over four days. There were 22 in-person participants and another 40 to 50 attended through a Webex virtual meeting system. *Id.* at 222-23. As a result of the meetings, a list of 162 issues was developed, which FairPoint is working through in an effort to remediate the problems. *Id.* Mr. Murtha described participation of the CLECs in these face-to-face meetings or conference calls as "very helpful" to FairPoint in solving problems with its systems and processes. *Id.* at 226-27.

FairPoint is planning another four days of meetings for the summer of 2010. It expects these meetings to involve about the same number of participants as the September 2009 meetings. Day 1 Tr. at 224 (Murtha). FairPoint intends to continue such meetings and conference calls as long as there are problems and issues to work out. *Id.* at 207 (Allen).

While it undoubtedly is better for FairPoint to involve CLECs in investigating problems with its systems and processes and devising solutions, the CLECs have had to devote substantial time and effort to the process. This was not time and effort that CLECs expected to spend. It is time and effort that is not devoted to running the CLECs' businesses, developing new products, selling and marketing them, and in general serving customers. It also was time and effort that would have been unnecessary if FairPoint had properly designed and tested its systems prior to cutover.

2. FairPoint's System and Process Issues have had Discriminatory and/or Anticompetitive Effects.

FairPoint's systems and process issues also have resulted in discriminatory or anticompetitive effects.

SegTEL noted several instances of FairPoint treating itself better than its wholesale customers. SegTEL reported instances of FairPoint's internal representatives having access to more extensive customer service records from FairPoint's systems than CLECs are able to obtain from those systems. Ex. SegTEL-1 at 7-9. Specifically, the CSRs obtained by SegTEL did not contain information necessary for FairPoint's OSS to accept orders from SegTEL. *Id.* at 8. This puts CLECs at a competitive disadvantage relative to FairPoint.

> The practical impact is that a CLEC like segTEL is faced with the unpalatable choice: we can either refuse to attempt orders to convert a customer of this sort to our services, or expend such inordinate amounts of time and effort to do so that the endeavor is completely unprofitable. Because the CLEC CSRs did not contain the data that FairPoint's CLEC OSS requires to process a wholesale order, the CLEC CSRs were inferior.

Id. at 8-9.

Similarly, SegTEL described how new addresses take five or more days to cycle through FairPoint's systems. This allows FairPoint to install service to new addresses more quickly and with fewer errors than CLECs that compete with FairPoint can. In an example described by SegTEL, FairPoint was able to install voice service to a new town police station ten days before SegTEL was able to provide internet service over circuits ordered from FairPoint. *Id.* at 7.

Late performance of wholesale service orders such as LSRs and ASRs continues to be a major problem, and is not significantly improving. Day 1 Tr. at 238, 240; Ex. OC-1.

As the result of FairPoint's system and/or process issues, customers have canceled requests for service. As a result, FairPoint has placed CLECs at a competitive disadvantage. Ex. BR-1 (Wilusz Prefiled) at 16.

FairPoint's systems problems have resulted in various billing audits, which have led to backbills. For example, as part of its efforts to remediate its billing system problems, FairPoint conducted an audit of special access mileage charges. FairPoint identified both over- and under-billing situations and, as a result, issued credits or backbills in appropriate situations. Ex. FP-8 (Allen Prefiled) at 21. FairPoint expects to conduct other, similar audits in the future. If it discovers other under-billing situations, it expects to issue backbills where called for. Day 1. Tr. at 166.

FairPoint back-bills its retail customers differently than its wholesale customers, however. It back-bills its wholesale customers for a period of time twice as long as for its wholesale customers — 180 days for retail customers, a year for wholesale customers. "Generally, back billing for confirmed under billing incidents is processed for the impacted period, but no more than 180 days for retail customers, and one year for Wholesale customers." Ex. Otel-3 (response by Tom Nolting of FairPoint to data request Otel 16).

FairPoint's backbilling policy is discriminatory on its face. It subjects CLECs and their customers to backbills that are double in duration compared with those to which FairPoint's retail customers are subject. Thus, two businesses operating across the street from one another, and identical in every respect but for the fact that one is a CLEC customer and one is a FairPoint customer, may be subject to very different backbilling liabilities. The CLEC customer potentially faces a year of backbills while its counterpart potentially faces only half that.

Reducing the risk of backbilling liability by one-half inevitably would be a significant factor in a customer's choice of telecommunications carrier. FairPoint's discriminatory policy creates an uneven playing field that is inconsistent with the public interest.

B. Extending the Conditions in the 2008 Agreements Relating to Wholesale Customers is Necessary to Alleviate, In Part, the Adverse Effects Those Customers Have Suffered.

1. The Regulatory Settlement Does Not Address the Fact that Wholesale Customers Did Not Receive the Benefits of The Conditions in the 2008 Agreements.

The competition-related conditions in the 2008 Agreements generally preserve the status quo by, for example, requiring extensions of interconnection agreements, freezing access and other rates, preventing reclassification of wire centers, subjecting FairPoint to the PAP, and setting other requirements. Ex. FP-2; Day 2 P.M. Tr. at 119 (Bailey). Some of these had a duration of three years and are scheduled to expire on March 29, 2011.

These conditions were designed to ensure that the competitive market was not impaired by the entry into the state of a new, dominant ILEC with little experience in the provision of wholesale services. They also were intended to ensure a period of stability during which FairPoint and its wholesale customers could concentrate on serving their customers and running their businesses without having to contend with interconnection negotiations, rate cases, and other, similar distractions. Similarly, the conditions established a period of stability in FairPoint's wholesale rates, and, consequently, FairPoint's wholesale customers' costs.

FairPoint would not disagree. Michael Scrivan testified that FairPoint might consider cost recovery actions "[s]ometime in the future, when we have time to catch our breath." Day 2 P.M. Tr. at 33-34. That is precisely the point. Getting set up and running smoothly has to take priority. Until the many problems are solved, FairPoint, and its wholesale customers who inevitably are forced to participate, should concentrate on that effort.

The proposed Regulatory Settlement does not go far enough in ensuring that the playing field is level and that FairPoint lives up to its obligations to its wholesale customers. The Regulatory Settlement will not alleviate, remedy, or compensate for any of the myriad problems and harms that FairPoint's wholesale customers have suffered. It does not alter any of the conditions in the 2008 agreements relating to wholesale customers or competition. Ex. Staff-Advocate-1 (Bailey Prefiled) at 3; Day 2 P.M. Tr. at 118-19.

The Regulatory Settlement does not initiate, mandate, or provide for any remedial measure. It does nothing to ensure that FairPoint provide high-quality service to its wholesale customers.

The Regulatory Settlement will not provide any offset for the increased costs incurred by FairPoint's wholesale customers as they struggle to deal with FairPoint's balky or inoperative systems. It will not compensate for lost business or business opportunities. Nor will it alleviate or address the damage to competition resulting from wholesale customers' inability to properly service their clients. The Regulatory Settlement will do nothing to stem defections by FairPoint or CLEC customers to cable or other alternative providers resulting from FairPoint's deteriorated service quality in connection with installation, repair, and billing.

Thus, the Regulatory Settlement will produce no net benefit for competition and the competitive markets in New Hampshire.

Worse, the Regulatory Settlement will result in net harm. FairPoint's petition for a change in control has presented an opportunity to examine FairPoint's policies and procedures, determine what is broken, ascertain how previous efforts to fix the problems have not been successful, and devise new and improved solutions. In short, action is called for, but the Regulatory Settlement takes none. The lost opportunity is a net harm.

2. Extending the Duration of the Conditions Is Necessary to Offset Existing and Future Adverse Effects.

As detailed above, FairPoint's wholesale customers have not received the benefits of stability and risk limitation that they expected after FairPoint took over from Verizon. To the contrary, FairPoint's systems and process issues have created instability, extra work, and potential loss of business for wholesale customers. Extending the conditions related to FairPoint's relationships with its wholesale customers would provide such customers with part of the benefit they expected after the transaction was approved.

It hardly needs to be said that service disruptions, billing issues, manual workarounds, increased staffing needs, and all the other problems that FairPoint has caused were not what wholesale customers expected or desired from the transfer of the Northern New England states' operations to FairPoint. Instead of a period of stability in which FairPoint and CLECs could concentrate on running their businesses and serving their customers, CLECs have had to devote inordinate amounts of time, effort, and expense addressing the problems heaped upon them by the inadequacies of FairPoint's systems and processes. Instead of providing telecommunications solutions to their customers, CLECs have spent their time and effort helping solve FairPoint's issues through innumerable conference calls and meetings. These activities have distracted CLECs from their main mission.

It is unlikely that any solution or compensation can fully address the harms resulting from FairPoint's problems. A partial solution, however, is to give the CLECs what they expected in the first place: a period of stability in which they can concentrate on serving their customers —

and FairPoint can as well. Extending the conditions in the CPG would be a significant step in that direction.[2]

C. The Conditions in the 2008 Agreement Related to Wholesale Customers Were Not a Cause of FairPoint's Bankruptcy.

The reasons why FairPoint determined to seek protection under the Bankruptcy Code included integrating the new Northern New England operations with the existing, pre-merger FairPoint operations, competition from cable companies and other, alternative technologies, monitoring, repairing, and upgrading the existing Northern New England telecommunications network, and the many difficulties presented by the cutover from Verizon's systems to the new FairPoint systems developed by Capgemini. Ex. FP-7 (Giammarino Prefiled) at 6.

Cutover issues played a major role in FairPoint's financial downfall. The inadequacies of FairPoint's back-office systems required increased processing time by FairPoint's customer service representatives for each order, increased processing time for invoices sent to customers, and large increases in call volumes into FairPoint's call centers. *Id.* at 7-8. As a result, in the first nine months of 2009, FairPoint incurred $28.8 million in additional expenses in the form of contractor costs and overtime pay. Over and above these expenses is the significant staff and senior management attention that had to be devoted to these problems. *Id.* at 8.

Not included among the causes of the bankruptcy were any of the conditions relative to competition that the Commission established when FairPoint took over Verizon's operations in New Hampshire. The conditions include measures such as restrictions on rate increases for UNEs and switched and special access. They also included prohibitions on actions that would

[2] Among the provisions of the October 2007 stipulated settlement terms between FairPoint and certain of its wholesale customers that the Commission should extend are: sections 1.d (wire center classifications); 4.d (cap on wholesale tariff rates); 5.a and .b (tariffed access services); and 7.a (no forbearance petition).

have the effect of eliminating lower-priced UNEs in favor of higher-priced special access services or services that may only be obtained through unregulated commercial agreements such as the Wholesale Advantage UNE-P replacement.

In short, FairPoint has made no claim that the restrictions on its ability to increase revenues by raising prices had any effect on its increasingly bleak financial situation or its decision to seek protection through a Chapter 11 filing.

As further evidence that the competitive conditions in FairPoint's CPG were not the cause of its bankruptcy filing, FairPoint is not depending on increased revenues from the elimination of those conditions in its financial projections as it exits from bankruptcy. See the discussion below.

D. Extending the Conditions Will Have No Undue Financial Effect Upon FairPoint.

FairPoint's financial projections as it exits from bankruptcy do not depend on increases in revenues that it might obtain through higher rates on items whose rates are currently capped or limited under its CPG. Accordingly, there will be no undue adverse financial effect on FairPoint from extending the duration of those caps or limits. Said another way, continuing the rate caps and other restrictions on FairPoint's ability to increase its revenues (and its customers' costs) for an additional period of time will not hamper FairPoint's ability successfully to emerge from bankruptcy.

The Plan Projections on which FairPoint bases its ability to exit bankruptcy are not dependent upon increases in revenues derived from the wholesale inputs that CLECs typically use. FairPoint has stated that its financial projections do not assume any increases in special access rates, switched access rates, or UNE rates.

> Has FairPoint assumed any increases to special access rates, switched access rates and/or UNE rates in its post-reorganization revenue projections? If so, please identify the specific rates that will be increased and the amount of the increase.
>
> FairPoint has not assumed any such rate increases in its post reorganization revenue projections.

Ex. Otel-7 (FairPoint Response to CLECs-48).

FairPoint's witnesses reiterated these points at the hearing. FairPoint's financial projections are not based on increases in rates for special access services. Day 1 Tr. at 51. Its financial projections also do not assume increases in switched access rates, UNE rates, or collocation rates. *Id.* at 51-52. In addition, FairPoint's financial projections do not assume that increases in special access revenues will be based on the fact that network elements currently available as UNEs will in the future only be available as special access. *Id.* at 52.

Similarly, the Staff Advocates' expert, Mr. Lisciandro, scrutinized the financial projections that underlie FairPoint's reorganization plan. He stated that FairPoint's projections concerning access rate increases were based only on "a percentage growth rate over the previous period rather than based on a more rigorous, customer-specific approach." Ex. Staff Advocates-2 (Lisciandro Prefiled) at 10. Mr. Lisciandro elaborated further that the factors typically used by telecommunications companies to calculate access revenues include customers, number of lines, minutes of use and rates. FairPoint did not use such a detailed approach that included factors such as rates and customers. Exs. Otel-9, Otel-10; Day 2 P.M. Tr. at 120-21. Specifically, Mr. Lisciandro confirmed that FairPoint's projections do not take into account any change in rates. Day 2 P.M. Tr.. at 121.

Mr. Lisciandro further stated that nothing in the information he reviewed suggested that FairPoint was planning to increase revenues by converting current UNEs to more expensive special access services. *Id.* at 122-23. One way it could do so, of course, is to reclassify wire centers so as to eliminate its obligation to provide unbundled high-capacity loops and/or transport at TELRIC prices, and instead provide those facilities as higher-priced special access. But Mr. Lisciandro saw no plans along those lines in the materials he reviewed. *Id.*

Even without any projected increases in the rates paid by CLECs for facilities or services such CLECs acquire from FairPoint, however, FairPoint claims that the Plan provides the financial resources so that the Company's operations will not have an adverse affect upon the rates, terms, service, and operations of FairPoint Communications-NNE in New Hampshire. Ex. FP-7 at 52-53.

Therefore, there will be no undue, adverse financial effect from continuing the prohibition against increasing some wholesale rates such as UNE rates, special access, switched access, collocation, and tandem transit. In addition, there will be no undue, adverse effect if the current prohibitions against actions that indirectly raise a wholesale customer's costs are continued in effect. These include the current prohibition against reclassifying wire centers, which could have the effect of eliminating TELRIC pricing on some high-capacity loop and transport facilities at wire centers no longer deemed "impaired" under the Telecommunications Act as interpreted in the *Triennial Review Remand Order*. There also will be no undue adverse effect by continuing the condition prohibiting FairPoint from eliminating its unbundling obligations or limits on its ability to raise prices through the mechanism of a forbearance petition.

E. FairPoint's Economic Interest, in Addition to the Public Interest, Is Served by Requirements that It Provide High-Quality Service and Maintain Existing Prices to Its Wholesale Customers.

FairPoint no doubt would argue that imposing restrictions on the way it treats its wholesale customers, including price and services quality requirements, are detrimental to its ability to compete in the modern telecommunications marketplace. FairPoint is wrong; just the opposite is true. Mechanisms that require, or provide incentives for, it to provide high-quality service to its wholesale customers and to maintain reasonable prices are in FairPoint's economic self-interest. Far from a detriment, compliance with such requirements benefits FairPoint as it tries to compete in the New Hampshire telecommunications marketplace.

FairPoint points to "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" as one of the challenges that led to its bankruptcy. Giammarino Prefiled at 7. That being the case, FairPoint's financial well-being depends on its ability to achieve revenues from both its retail *and* wholesale operations, and not lose *both* retail and wholesale revenues when customers desert for the cable company or other alternative provider that does not use FairPoint's network.

To the extent that FairPoint's systems or the prices it charges impede its own ability to compete, that hinders its ability to realize those revenues. By the same token, if FairPoint's systems, service, or prices impede the ability of its wholesale customers to compete, that also prevents FairPoint from realizing needed revenues.

The Staff's experts from the Accion Group[3] underscored this point at the hearing. They testified that if a FairPoint retail customer switched to a wireline CLEC using FairPoint's facilities, FairPoint stood to gain wholesale revenue even as it lost the retail revenue. Day 3 Tr. at 33. However, FairPoint would lose even the wholesale revenue if its poor service quality drove the CLEC's retail customer off the network to a cable competitor. *Id.* Similarly, increases to FairPoint's wholesale prices, if they caused the wholesale customer to raise its prices as a result, could drive the wholesale customers away to a cable company. *Id.* at 36. As Mr. Gross of the Accion Group stated, "[N]o matter what the reason was for the loss of the [CLEC end-user] customer, whether it be competitive service, rate differences or whatever, it would be a loss of revenue." *Id.* at 35.

Therefore, it is in FairPoint's interest to ensure that end-users of its CLEC wholesale customers do not desert for the cable company. The reason for the defection does not matter. It is in FairPoint's interest to ensure that poor service quality does not drive the CLEC's end-users away to the cable company. It is in FairPoint's interest to ensure that it provides timely installations and prompt repairs. It also involves FairPoint's ensuring that facilities work as they are supposed to.

Similarly, while price increases to FairPoint's wholesale customers may be attractive in the short term, if they induce CLEC customers to switch to cable companies, perhaps never to return, then those wholesale price increases work a long-term economic harm to FairPoint. Likewise, actions by FairPoint that increase its wholesale customers' costs in other ways, such as

[3] The experts from the Accion Group "were retained to assist the Non-Advocate Staff in conducting their review and analysis and making findings and recommendations to the Commission with regard to the company's requested actions." These findings and recommendations are contained in the Accion Group's two reports and the testimony of its consultants at the hearing. Day 3 Tr. at 28.

by reclassifying wire centers or forbearance petition that may force CLECs to buy special access rather than UNEs, can have the same, counterproductive effect.

Thus, in addition to the fact that FairPoint was not depending on increases to its wholesale rates in order successfully to exit bankruptcy, regulatory constraints that limit its ability to raise rates or increase CLEC's costs will have no undue adverse effect on its potential post-bankruptcy prospects.

II. The Commission Should Establish Conditions to Prevent Further or Continuing Adverse Effects on the Rates, Term, and Condition of Service on the State.

A. The Commission Should Require an Audit of FairPoint's Service Quality Metrics

The testimony at the hearing cited various examples of FairPoint service quality measurements that appeared to present an inaccurate view of service quality performance. For example, FairPoint suggested that its chronically late LSR performance is the result in part of CLECs' neglecting to port numbers on the specified due date.[4] Day 1 Tr. at 238. Also, PAP credits reported by FairPoint declined by about 25% form February to March 2010. Perhaps not coincidentally, in March, FairPoint concluded its "metric remediation" project — which had an express goal of reducing FairPoint's penalties in the range of 20-30%. Day 2 P.M. Tr. at 23-25. Compounding the problem, "[FairPoint is] not reporting all the metrics under the PAP and the C2C at this point." Day 1 Tr. at 182.

In order to reconcile what the data say with FairPoint's actual performance, it is appropriate to conduct a complete audit of the C2C/PAP metrics and FairPoint's performance under those standards.

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[4] Even if that were true, that has no bearing on the lack of improvement in late performance over time.

Kate Bailey, one of the Staff Advocates who signed the Regulatory Settlement, testified that the Regulatory Settlement would not alter section 9.4 of the 2008 Settlement Agreement. Day 2 P.M. Tr. at 119. Section 9.4 provides:

> FairPoint agrees to pay for the conduct of an independent audit of its wholesale performance assurance plan. If a simplified wholesale performance assurance plan is adopted prior to June 1, 2010, the audit shall take place following the first six months during which that plan is in effect. If no simplified plan is in effect by June 1, 2010, or if efforts to develop such a plan have terminated before that date, then FairPoint agrees to such an independent audit of the existing wholesale performance assurance plan. The Commission will be solely responsible for the choice of the independent auditor, but will afford FairPoint the opportunity to submit the names of firms to be included within the list of firms to receive requests for proposals for the provision of such services.

Accordingly, the Commission should require as a condition of any approval of FairPoint's transfer of control an audit of FairPoint's performance under the C2C and PAP metrics. All the preconditions under section 9.4 have been satisfied — June 1, 2010 has passed, and there is no simplified PAP in place.

It would not be advisable for the Commission to open a separate proceeding at a future date to consider whether and when to conduct the audit. Service quality issues continue to plague the relationship between FairPoint and its wholesale customers. The C2C/PAP metrics are an essential barometer of FairPoint's service quality to such wholesale customers. It is crucial that those metrics be trustworthy. An audit will help to establish that the metrics are indeed accurate and reliable.

FairPoint acknowledges that it is important to have accurate service quality data. Day 1 Tr. at 164 (Allen). Quarrels over the accuracy of the metrics by which FairPoint's performance will be measured will only add to the number of issues that need to be resolved by the Staff, FairPoint, and CLECs. Such disputes will distract the parties from the core task of improving service, and will delay a return to normalcy. Thus, the audit should be conducted as soon as possible.

B. The Commission Should Require FairPoint to Establish an Escrow to Fund Unfinished Systems Remediation or Other Projects.

FairPoint has numerous initiatives underway in an effort to solve the myriad cutover-related systems and process issues that have decreased its own productivity and created massive problems for CLECs and other wholesale customers. Chief among these are the Customer Delivery Improvement Projects (CDIP), a series of about fifteen improvements designed to remedy systems-related issues. FairPoint anticipates the completion date of the CDIP initiatives to be September 2010.

FairPoint has stated explicitly that if satisfactory results are not achieved by the projected end date of the CDIP initiatives, it is committed to working on the issue until acceptable results are achieved. *E.g.,* Day 1 Tr. at 223 (Murtha); *id.* at 129 (Nolting).

However, experience with the cutover has demonstrated that FairPoint and its consultants continually underestimate the scope, complexity and costs of its system development and remediation efforts necessary for FairPoint to perform at a satisfactory level. As Mr. Allen testified on cross-examination, FairPoint has had numerous initiatives since cutover, each of which was designed to remediate cutover-related problems. The first "stabilization plan" was supposed to return FairPoint to "business as usual" by the second quarter of 2009. Day 1 Tr. at 175-76 (Allen). FairPoint failed to achieve that goal. *Id.* at 176. It then embarked on another set of initiatives to achieve needed remedies. *Id.* at 176-77. Such plans have come and gone, but FairPoint's systems woes continue.

In addition, FairPoint may think that it has fixed a problem to its satisfaction, but that fix is not practically useful to its wholesale customers. Kath Mullholand of SegTEL cited an example of a software fix that appeared consistent with FairPoint's design specifications, which called for use of an 8-digit CLLI code. Unfortunately, that was not useful to CLECs, who required an 11-digit CLLI to place orders. So, the job was not quite done. Day 2 P.M. Tr. at 88-89.

In addition, the same IT department that is working on system fixes (particularly those affecting wholesale customers) is also bringing out numerous system enhancements for FairPoint's benefit that are above and beyond what is needed to correct the serious and immediate problems. Day 2 A.M. Tr. at 17.

Based on examples like that above, and the track record to date, there appears no way to predict with any degree of certainty when all cutover-related systems issues will be resolved. In particular, there is no guarantee that all issues will be resolved this calendar year. At some point, FairPoint may say "good enough" and not spend the money to fully restore service quality to acceptable levels.

FairPoint has set itself up to make that unfavorable outcome a virtual certainty. FairPoint's Plan Projections have not budgeted cutover-related activities after 2010. Ex. FP-7 (Giammarino Prefiled) at 43. Mr. Newitt confirmed at the hearing that cutover-related expenses would be eliminated in 2010. Day 1 Tr. at 54. The Non-Advocate Staff experts from the Accion Group further confirmed that FairPoint's financial projections eliminate cutover-related expenses in 2010. Ex. Non-Adv. Staff 2, at 18; Day 3 Tr. at 30-31. The expense reductions include reductions in head count. Ex. Non-Adv. Staff 2, at 8; Day 3 Tr. at 30-31.

That being the case, the Board should require FairPoint to establish an escrow to retain funds that may be needed to complete cutover-related remediation work if FairPoint does not complete all such projects and achieve the desired results before it eliminates funding of cutover remediation by the end of 2010. Requiring FairPoint to place funds in escrow to develop and trouble-shoot its systems to the point where they consistently provide satisfactory service, including meeting or exceeding all PAP standards and other applicable yardsticks would be a reasonable way to assure FairPoint does have the resources to finish the necessary systems development projects. The escrow essentially would put aside money to fund projects that go over budget or are extended beyond their anticipated completion date.

Cutover-related issues caused FairPoint to incur an incremental $28.8 million in expenses during the first nine months of 2009. Ex. FP-7 at 9. This corresponds to monthly incremental cutover-related expenses of $3.2 million. It would be reasonable to estimate that cutover-related expenses after the completion of the CDIP projects would be some portion of that amount. An escrow of $3 million, calculated as approximately one-third of the monthly incremental expenses (between $1.0 and 1.1 million) times three months, might be a reasonable starting point.

C. The Commission Should Set a Time Limit on Backbilling and Such Limit Should Be the Same for Retail and Wholesale Customers.

As described above, as the result of FairPoint's efforts to resolve its systems issues and remedy past failures and errors in the area of billing, it has issued backbills to its wholesale customers. It plans more billing system initiatives in the future. If these reveal instances of under-billing, FairPoint intends to issue backbills. Day 1 Tr. at 166 (Allen). FairPoint has no projected end date for these billing initiatives. *Id.* at 167.

Backbills present significant problems for CLEC wholesale customers of FairPoint. Reviewing bills is a time-intensive process. Ex. CRC-2 (Tisdale Prefiled) at 7-8. The level of effort is compounded when a backbill covers multiple months. Further, the difficulty of the process is heightened by the passage of time, when it may be more difficult to review events that occurred in that past.

Imposing a limit on the period for which FairPoint may issue backbills would reduce the degree of the problem. It would require FairPoint to produce more accurate bills in the first place. It also would alleviate some of the difficulties wholesale customers face when trying to reconcile old bills.

FairPoint already imposes a limit on the length of time for which it will backbill — 180 days for retail bills and one year for wholesale bills. Ex. Otel 3. To require FairPoint to continue its current practice will involve no detriment to FairPoint.

Even at that, however, FairPoint's backbilling practices remain a problem. FairPoint backbills its own retail customers for no more than 180 days, while it backbills its wholesale customers for one year. *Id.* That practice is discriminatory on its face. The shorter time period during which it will backbill its retail customers gives those customers a competitive advantage over CLECs and their customers, who must endure backbilling over a period at least twice as long as FairPoint's retail customers.

Therefore, for the reasons set forth above, the Commission should limit the period during which FairPoint may backbill to transactions that occurred six months or less before the date of the backbill.

D. The Commission Should Require That an Independent Monitor of Cutover and Wholesale Issues Be Maintained.

The Non-Advocate Staff experts from the Accion Group recommended that the Commission retain a monitor to closely monitor all steps taken by FairPoint to attain its revenue projections and operational improvements. Non-Adv. Staff Ex. 2, at 15. The Accion Group experts were not confining their recommendation to a single monitor. Day 3 Tr. at 45. An independent monitor of cutover issues — the role currently performed by Liberty Consulting — was along the lines of what the Staff's experts had in mind. *Id.* at 83. A Liberty-like monitor of cutover and systems issues would "obviously" perform a valuable function in monitoring the steps that FairPoint took to improve the operational aspects of its relationship with its wholesale customers. *Id.* at 46.

The independent monitor of wholesale and cutover issues should be charged with overseeing and inspecting FairPoint's progress in remediating its systems woes. It also should report to the Commission on all such issues and FairPoint's efforts to fix problems.

Liberty has performed a valuable function to date as a clearinghouse for information on problems with FairPoint's systems post-cutover and FairPoint's efforts to resolve post-cutover problems, and assisting with remediation efforts. For example, Liberty recently surveyed FairPoint's wholesale customers and compiled a list of over 100 unresolved problems. Ex. CRC 11. FairPoint's Richard Murtha stated at the hearing that Liberty's compilation will form the basis of another set of action items for FairPoint to investigate and correct. Day 1 Tr. at 225-26. Staff Advocate Kate Bailey cited Liberty's work in compiling the list as an example of ways to improve communication and information flow. Day 2 P.M. Tr. at 142.

The Commission should have a means to independently verify and report on FairPoint's remediation efforts. As the experts from Accion Group testified, an independent monitor can be a useful facilitator and an additional source of information for the Commission and Staff in their efforts to ensure that FairPoint complies with its service quality obligations and other efforts to remedy its operational problems. Day 3 Tr. at 77-79. An independent monitor would not supplant the Commission Staff in its normal role as regulator and enforcer, but would be one of the items in the toolbox available to the Staff as it works to ensure that FairPoint continues to make progress towards achieving satisfactory levels of performance. *Id.* at 79-80.

Conclusion

FairPoint has not made, and cannot make, the two showings that are essential for it to obtain the relief it has requested in this docket: that the Regulatory Settlement is just and reasonable and in the public interest, and that the announced change of control of FairPoint Communications, Inc. will not adversely affect rates, terms, service, or operation of FairPoint Communications-NNE within the state.

The Regulatory Settlement is not just, reasonable, and in the public interest with respect to FairPoint's wholesale customers or to the matter of telecommunications competition within the state. The Regulatory Settlement does nothing to alleviate, remedy, or compensate for the deteriorated levels of service that wholesale customers have endured since cutover. Not only will the Regulatory Settlement bring no net gain in these areas, the failure to take the opportunity to address these matters will result, indeed, in net detriment.

Second, there can be no argument that FairPoint's cutover fiasco has had an adverse effect on many aspects of FairPoint's service and operations in the state. The proposed change in control will not correct the problems, remedy the harms, or compensate for the damage done. The failure to do so, with the result that the problems will persist, itself is an adverse effect on rates, terms, conditions, and operations of FairPoint-NNE.

The conditions proposed by Otel and other wholesale customers will in part alleviate or compensate for the problems FairPoint has caused and its ongoing failures to correct those problems and remedy their harms. Only with the conditions listed above may the Commission find that the Regulatory Settlement is in the public interest and the proposed transaction will have no ongoing adverse effects.

Therefore, for the reasons above, the Commission must condition any approval of the Regulatory Settlement or proposed change of control as described above.

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Respectfully Submitted,

/s/ Gregory M. Kennan

Gregory M. Kennan
Of Counsel
Fagelbaum & Heller LLP
20 North Main St., Suite 125
P.O. Box 230
Sherborn, MA 01770
508-318-5611 Tel.
508-318-5612 Fax
508-259-0786 Mob.
gmk@fhllplaw.com