

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 10-025**

**FAIRPOINT COMMUNICATIONS, INC., NORTHERN NEW ENGLAND TELEPHONE  
OPERATIONS LLC D/B/A FAIRPOINT COMMUNICATIONS—NNE AND  
NORTHLAND TELEPHONE COMPANY OF MAINE, INC.**

**REORGANIZATION**

**Order Approving Regulatory Settlement Agreement and Other Transactions Related to  
Bankruptcy Reorganization**

**ORDER NO. 25,129**

**July 7, 2010**

**APPEARANCES:** Devine, Millimet & Branch, P.A., by Frederick J. Coolbroth, Esq., Patrick C. McHugh, Esq., and Harry Malone, Esq., and Shirley J. Linn, Esq., General Counsel, FairPoint Communications, Inc., for FairPoint Communications, Inc., Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE and Northland Telephone Company of Maine, Inc.; Adler, Pollack and Sheehan by Alan M. Shoer, Esq., for BayRing Communications; Carolyn Cole, Esq., General Counsel, for SegTEL, Inc.; Fagelbaum & Heller, LLP, by Gregory M. Kennan, Esq., for Otel Telekom, Inc.; Orr & Reno, P.A., by Susan S. Geiger, Esq., for Comcast Phone of New Hampshire, LLC; Paula Foley, Esq., for One Communications; Trina Bragdon, Esq., for CRC Communications of Maine; New Hampshire Legal Assistance by Alan M. Linder, Esq., for Irene Schmitt; Office of Consumer Advocate by Meredith A. Hatfield, Esq., and Rorie E.P. Hollenberg, Esq., on behalf of residential ratepayers; New Hampshire Department of Justice, Office of Attorney General, by Peter C.L. Roth, Esq., on behalf of Staff Advocates; and Harold T. Judd, Esq., and Edward N. Damon, Esq., for the Non-Advocate Staff of the New Hampshire Public Utilities Commission.

**I. PROCEDURAL HISTORY**

In this docket the Commission rules on certain requests for approval that were made in connection with a bankruptcy proceeding initiated by FairPoint Communications, Inc. (FairPoint Communications) and its subsidiaries (FairPoint Communications and relevant subsidiaries, FairPoint or Company, unless the context indicates otherwise) on October 26, 2009 by a filing for a voluntary reorganization under Chapter 11 of the United States Bankruptcy Code in the

United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court). Among the subsidiaries included in the bankruptcy were Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (FairPoint-NNE) and Northland Telephone Company of Maine, Inc. (Northland),<sup>1</sup> incumbent local exchange carriers with operations in New Hampshire, among other northern New England states. Since the bankruptcy filing, FairPoint has been operating as a debtor in possession.

On February 12, 2010, FairPoint filed copies of its First Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code (as from time to time modified and/or supplemented to the date of this Order, referred to herein as the Plan of Reorganization or Plan, unless the context indicates otherwise) together with a related proposed Amended Disclosure Statement (as from time to time amended, Disclosure Statement, unless the context indicates otherwise) previously filed with the Bankruptcy Court. Included as part of the Plan of Reorganization is a Post Filing Regulatory Settlement – New Hampshire (Regulatory Settlement) between FairPoint, FairPoint-NNE and Staff Advocates. The Regulatory Settlement contains provisions regarding process, the New Hampshire merger conditions and financial conditions set forth in the 2008 Order and 2008 Settlement Agreement,<sup>2</sup> and several miscellaneous matters. The Staff Advocates are Kathryn M. Bailey, Director of the Telecommunications Division of the Commission and F. Anne Ross, General Counsel. In a secretarial letter issued on November 9, 2009, the Commission noted that Ms. Bailey and Ms. Ross would be treated in the manner of

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<sup>1</sup> FairPoint-NNE conducts operations throughout the State while Northland operates in East Conway and Chatham, New Hampshire.

<sup>2</sup> As defined in the Regulatory Settlement, these references are to the Settlement Agreement executed by certain Verizon companies (Verizon), FairPoint Communications and Staff and filed with the Commission on January 24, 2008 (2008 Settlement Agreement), incorporated by reference and approved by Order Approving Settlement Agreement with Conditions. Order No. 24,823 dated February 25, 2008, as subsequently amended (2008 Order). Order No. 24,823 was issued in Docket No. DT 07-011 and published as *Verizon New England, Inc.*, 93 NH PUC 24, 264 P.U.R.4th 185.

staff advocates<sup>3</sup> in relation to Commission matters directly affecting or directly affected by the Plan of Reorganization. As Staff Advocates working in conjunction with the Department of Justice and the Office of the Governor, they represent the citizens of the State of New Hampshire.

On February 24, 2010, FairPoint filed a petition (Petition) requesting certain approvals in connection with the Plan of Reorganization. In support, FairPoint submitted pre-filed direct testimony and exhibits of Alfred C. Giammarino, Jeffrey W. Allen, Vicky Weatherwax, Bryan Lamphere, Thomas P. Nolting and Richard Murtha. The Petition requested that the Commission:

- 1) pursuant to N.H. Code Admin. Rules Puc 203.20, find that the Regulatory Settlement is just and reasonable and serves the public interest and approve the same;
- 2) pursuant to RSA 369:8, II(b), determine that the change in control of FairPoint Communications, Inc., as parent company of FairPoint-NNE and Northland, will not have an adverse effect on the public utility rates, terms service or operation of FairPoint-NNE and Northland within New Hampshire;
- 3) pursuant to RSA 365:28, approve the modifications to the 2008 Settlement Agreement, as set forth in the Regulatory Settlement; and
- 4) pursuant to RSA 369:2, approve the pledge by FairPoint-NNE of its membership interests of the Telephone Operating Company of Vermont LLC (VT Telco).

On February 25, 2010, Senior Assistant Attorney General Peter Roth, Esq., filed a letter on behalf of Staff Advocates that, among other things, urged the Commission to review the Regulatory Settlement and the Petition pursuant to RSA 374:30, 369:8 and 369:1-4. He also proposed a procedural schedule that had been agreed to by FairPoint.

The Commission issued an order of notice on February 26, 2010, which formally designated Ms. Bailey and Ms. Ross as Staff Advocates and scheduled a pre-hearing conference and a technical session for March 9, 2010. The order of notice also stated that because the

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<sup>3</sup> A Commission Staff member designated as a staff advocate pursuant to RSA 363:30-36 may not advise the Commission with respect to matters at issue. See RSA 363:35.

proposed schedule is inconsistent with certain deadlines established in RSA 369:8, II, the Commission considered the schedule to constitute a waiver of certain provisions of the statute, citing *Public Service Company of New Hampshire*, 85 NH PUC 125, 126-127, Order No. 23,432 (2000) and *National Grid plc*, Order No. 24,690, 91 NH PUC 505, 508 (2006).<sup>4</sup>

The Office of Consumer Advocate filed a notice of participation on behalf of residential ratepayers consistent with RSA 363:28 on March 9, 2010. Also during March 2010, the following parties petitioned to intervene: Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as One Communications Solutions of New Hampshire (collectively, One Communications); Comcast Phone of New Hampshire, LLC (Comcast Phone); Otel Telekom, Inc. (Otel); New Hampshire Legal Assistance on behalf of Irene Schmitt (NHLA); BayRing Communications, Inc. (BayRing); CRC Communications of Maine, Inc. (CRC); and segTEL, Inc. (segTEL). The foregoing requests for intervention were granted during the pre-hearing conference on March 9, 2010, and Staff Advocates' participation was recognized. Late intervention requests were filed by Level 3 Communications, LLC (Level 3); RNK, Inc. d/b/a RNK Telecom (RNK); and DIECA Communications, Inc. d/b/a Covad (Covad). Subsequently, on April 27, 2010, Level 3 moved to withdraw.<sup>5</sup>

On March 5, 2010, Staff Advocates submitted prefiled testimony of Kathryn M. Bailey and John Lisciandro, Director of Deloitte Financial Advisory Services LLP. On March 9, 2010, the Commission issued a secretarial letter regarding an e-mail that had been sent from outside the Commission to the Commission's general e-mail account. The e-mail was addressed to Ms.

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<sup>4</sup> At the pre-hearing conference held on March 9, 2010, FairPoint agreed that the proposed procedural schedule constituted an acceptable substitute for the time frames set forth in RSA 369:8, II. Transcript of Pre-hearing Conference at 51.

<sup>5</sup> The late intervention requests of RNK Telecom and Covad are granted, as is Level 3's motion to withdraw from this docket.

Bailey, who forwarded it to the Commissioners. The secretarial letter stated that the substantive issues raised by the e-mail could be pursued in the normal course of discovery in this proceeding and that the designation of Ms. Ross and Ms. Bailey as Staff Advocates should be observed with respect to exploring the allegations. The letter also stated that because the e-mail raised issues that may lead to the discovery of information relevant to this proceeding, it was being placed in the docket book for use by the parties. However, the Commission redacted the name and address line, pending the Commission's determination of whether it is appropriate to disclose the identifying information regarding the author of the e-mail.

On March 11, 2010, Non-Advocate Staff filed a report of the technical session held on March 9, 2010, which included a revised recommended procedural schedule reserving May 24-28, 2010 for the evidentiary hearing on the petition. Also on March 11, 2010, FairPoint filed copies of Debtors' Second Amended Joint Plan of Reorganization and Second Amended Disclosure Statement under Chapter 11 of the Bankruptcy Code. The recommended procedural schedule was approved by secretarial letter issued on March 16, 2010. On March 22, 2010, Non-Advocate Staff filed a request to modify the procedural schedule to permit additional technical sessions, which was granted by secretarial letter dated March 24, 2010. On March 29, 2010, FairPoint-NNE moved for an interim suspension of the March 31, 2010 broadband deployment deadline pending the Commission's decision on the Regulatory Settlement. The broadband deadline referred to was FairPoint-NNE's commitment in section 3.2 of the 2008 Settlement Agreement to provide broadband availability to 85% of its access lines within New Hampshire by March 31, 2010.

During April 2010, the following submitted pre-filed testimony: Kath Mullholand, Director of Operations on behalf of segTEL; Richard E. Thayer, Senior Corporate Counsel, on

behalf of Level 3; Wendy Wilusz, Director of Operations, on behalf of BayRing; Nicholas A. Winchester, Senior Vice President, and Ed Tisdale, Vice President – Finance & External Relations, of Otelco, Inc., parent company of Mid Maine Telplus d/b/a Mid Maine Communications and CRC, on behalf of CRC; and Alan Kessler and Raymond Gross, Senior Consultants for Accion Group, Inc. (Accion Group) and Ron Cassel, Chief Executive Officer, Millennium Communications Group, Inc., on behalf of Non-Advocate Staff. In addition, Non-Advocate Staff filed a request for a modification of the procedural schedule on April 9, 2010, which the Commission approved by secretarial letter dated April 12, 2010.

On April 22, 2010, FairPoint notified the Commission of the re-designation of the pre-filed direct testimony of Alfred Giammarino, who had just resigned, to the following witnesses: Lisa Hood, Senior Vice President and Corporate Controller and interim Chief Financial Officer, Ray Allieri, Executive Vice President and Chief Strategy Officer, Lee Newitt, Director of Corporate Development and Financial Planning and Analysis, and Michael Skrivan, Vice President of Regulatory Affairs. In addition, the letter indicated that FairPoint's recently hired Chief Information Officer, Kathleen McLean, would co-sponsor the pre-filed direct testimony and exhibits submitted on behalf of Vicky Weatherwax. On April 26, 2010, FairPoint filed copies of the Plan Supplement to the Plan of Reorganization in accordance with section 16.6 of the Debtors' Second Amended Joint Plan of Reorganization.

On April 30, 2010, FairPoint filed the testimony of Lisa R. Hood, which provided a brief explanation and update regarding the restatements of 2009 quarterly revenues that Mr. Giammarino had referenced in his pre-filed testimony as well as certain aspects of FairPoint's Plan Supplement. FairPoint also filed rebuttal testimony of Richard Murtha and Thomas P. Nolting on May 7, 2010. On May 10, 2010, FairPoint submitted copies of certain documents

which had been filed with the Bankruptcy Court, including the First Supplement to Plan Supplement, Blackline of Modified Credit Agreement (Item 7 to Plan Supplement) and Debtors' Modified Second Amended Joint Plan of Reorganization.

On May 17, 2010, the Commission issued a secretarial letter stating that FairPoint-NNE's motion filed on March 29, 2010 would be heard in conjunction with the hearing on the merits. Also on May 17, 2010, Non-Advocate Staff filed a letter with a suggested schedule of witnesses on behalf of Non-Advocate Staff, Staff Advocates, and the parties. On May 18, 2010, Accion Group filed on behalf of Non-Advocate Staff a supplemental report to its preliminary report attached to its pre-filed testimony. On May 20, 2010, the Commission issued a secretarial letter setting forth its expectations regarding certain procedural aspects of the remaining proceedings in this docket. The hearing on the merits was held May 24 through 26, 2010.

FairPoint filed several responses to record requests made at hearing and reserved as FairPoint hearing exhibits between May 27, 2010 and June 4, 2010. On May 28, 2010, Staff Advocates filed a reproduction of Exhibit Staff Advocate 3. Post-hearing written submissions were filed in accordance with the procedural schedule by FairPoint, Staff Advocates, One Communications, Comcast, Otel, BayRing, segTEL, CRC, NHLA, and Accion Group on behalf of Non-Advocate Staff.

On July 1, 2010, FairPoint filed a letter describing certain proposed amendments to the Plan arising from issues raised at the hearing with regard to retention of jurisdiction by the Bankruptcy Court. According to the letter, FairPoint continued discussions with Staff Advocates and legal representatives of the State of New Hampshire regarding Article XV of the Plan. In light of these discussions, FairPoint represented that if the Commission approves the Regulatory Settlement and grants the other requested approvals without revisions or further conditions,

FairPoint Communications will file the following amendments to the Plan with the Bankruptcy Court:

1. The Plan will be amended by inserting immediately following Section 16.17, the following new Section 16.18:

16.18 Except with respect to the process for allowance or disallowance of Claims asserted by any entity (other than the NHPUC) against any of the Debtors with respect to any period prior to the Effective Date, and notwithstanding anything to the contrary in this Plan (including Section XV), nothing herein shall (I) prior to the Effective Date, confer exclusive jurisdiction upon the Bankruptcy Court with respect to the Regulatory Settlements, or (II) from and after the Effective Date, confer jurisdiction upon the Bankruptcy Court with respect to the oversight and regulation of the business or operations of the Reorganized FairPoint or issues arising out of, or with respect to the implementation and enforcement of, the Regulatory Settlements; and provided further that all reservations of rights with respect to the jurisdiction contained in the Regulatory Settlements or otherwise made in the record of the Bankruptcy Court during the Chapter 11 case shall remain in full force and effect.

2. The Plan will be amended by deleting the last paragraph of Section 14.2 in its entirety and replacing it with the following:

For the avoidance of doubt, this Section 14.2 shall not limit the implementation of the NHPUC Regulatory Settlement or, as to the business and activities of FairPoint in New Hampshire as conducted on and after the Effective Date of the Plan, the application and enforcement of applicable state law (consistent with the provisions of the NHPUC Regulatory Settlement) with respect to the regulation of FairPoint by any New Hampshire governmental unit, including the NHPUC.

3. The Plan will be amended by deleting the last paragraph of Section 14.4 in its entirety and replacing it with the following:

For the avoidance of doubt, this Section 14.4 shall not limit the implementation of the NHPUC Regulatory Settlement or, as to the business and activities of FairPoint in New Hampshire as conducted on and after the Effective Date of the Plan, the application and enforcement of applicable state law (consistent with the provisions of the NHPUC Regulatory Settlement) with respect to the regulation of FairPoint by any New Hampshire governmental unit, including the NHPUC.

In the letter, FairPoint Communications also commits to making conforming changes to the confirmation order. The letter represents that Staff Advocates have reviewed the letter and concur that it addresses their concerns regarding Article XV of the Plan and further represents that the amendments to the Plan are acceptable to the representatives of FairPoint's secured lenders.



## II. SUMMARY OF PLAN OF REORGANIZATION

According to FairPoint, the Plan of Reorganization has now been approved by FairPoint's creditors. Under the Plan, the claims of secured lenders under the pre-petition secured credit agreement, aggregating 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 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.

The pre-petition unsecured claimants (whose 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, 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. The claims of subordinated creditors of FairPoint Communications will receive no distributions, and all of the shares of stock of FairPoint Communications outstanding as of the Chapter 11 filing will be cancelled and the holders thereof will receive no payment or distribution. Allowed unsecured claims of creditors of FairPoint-NNE and Northland will be honored in full. Through the conversion of the pre-petition debt to equity, FairPoint's creditors will control approximately 98% of FairPoint's stock.

Following the Effective Date, the total debt (secured and unsecured) of FairPoint will be reduced approximately 63%, from approximately \$2.7 billion as of the Chapter 11 filing date to

approximately \$1 billion. In addition to the \$1 billion in term loans, the Plan of Reorganization contemplates that FairPoint will enter into a new \$75 million revolving credit facility. FairPoint will also recognize capital lease obligations of \$6,818,000.

The new Credit Agreement set forth in the Plan Supplement contains provisions regarding the term loan and the revolving credit facility. Under the Plan of Reorganization, the Credit Agreement will be secured in part by the pledge of FairPoint's stock in each of its subsidiaries and the stock of VT Telco. The assets of FairPoint-NNE and Northland will not be pledged.

The Credit Agreement provides for annual "sweeps" of "Excess Cash Flow" as defined in the Plan. The cash sweeps restrict the amount of uncommitted cash FairPoint may accumulate in each year. Amounts in excess of the allowed amount must be used to prepay the principal amount of the term note. FairPoint is permitted to exclude from the year-end calculation of "Excess Cash," cash to fund planned capital expenditures and funds not spent but earmarked for capital improvements in the prior year that will be spent in the first quarter of the following calendar year.

The Credit Agreement also establishes limits on the amount FairPoint may commit to capital expenditures during each of the five years the Credit Agreement is in force. The capital expenditure limits applies to FairPoint and all of its subsidiaries.

The new term loan will be secured by the same or substantially the same collateral as the collateral which secures the debtor in possession financing, except to the extent prohibited by law. The loan has a 5 year maturity and will accrue interest at a rate equal to LIBOR + 4.50%, with a LIBOR floor of 2.00%. At current LIBOR rates, the interest rate on the term loan is 6.50%. Other terms include: no upfront fee; mandatory prepayment at par, to be made upon

conditions to be determined in the Plan Supplement; optional prepayment can be made at anytime at par. Amortization will be as follows; Year 1: 1% annually, Year 2: 1% annually, Year 3: 5% annually, Year 4: 15% annually and Year 5: 15% (5% per quarter for the first 3 quarters) with a 63% final payment in the 4th quarter. Amortization occurs quarterly, commencing upon the first full quarter after the Effective Date.

In addition, under the new term loan, if FairPoint's consolidated leverage ratio is above 2.0 times at the end of the fiscal year, FairPoint shall be subject to a sweep of 75% of its Excess Cash Flow, based upon an annual test and paid in the subsequent quarter with the first test occurring for fiscal year 2010 for the period from the Effective Date through the end of 2010 and payable in fiscal 2011. If FairPoint's consolidated leverage ratio is below 2.0 times at the end of the fiscal year, the sweep will be reduced to 50% of FairPoint's Excess Cash Flow. If FairPoint's consolidated total leverage ratio is below 2.0 times at the end of the fiscal year, FairPoint will be permitted to pay dividends with its share of Excess Cash Flow and, even then, FairPoint will only be permitted to pay dividends with its share of Excess Cash Flow.<sup>6</sup> Financial covenants only include interest coverage and leverage ratio tests and first occur in the first full quarter following the Effective Date of the Plan.

Under the Plan, a new board of directors will be appointed on the Effective Date. Finally, the Plan Supplement contains information related to the Success Bonuses. The Disclosure Statement contains projected financial information through 2013 based on the current business plan for reorganized FairPoint.

FairPoint stated that “the overall objective of the Plan is to balance the interests of all stakeholders, ensure that FairPoint can meet its obligations to its customers and fulfill their

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<sup>6</sup> Mr. Giammarino's pre-filed testimony stated that FairPoint has no plans to pay dividends following its emergence from Chapter 11. See pre-filed testimony (public version) of Alfred C. Giammarino, adopted and sponsored by Lisa R. Hood, at 33-34.

expectations, and to establish a financial structure that will insure FairPoint's financial viability and position the company for success in the future.” Pre-filed testimony of Alfred Giammarino, adopted by Lisa Hood, at 22-23.

### **III. SUMMARY OF REGULATORY SETTLEMENT**

The Regulatory Settlement is part of the Plan of Reorganization. The Regulatory Settlement is divided into sections covering four areas: process, the merger conditions in the 2008 Settlement Agreement, the financial conditions of the 2008 Settlement Agreement, and miscellaneous matters.

Regarding process matters, section 1.1 states that the parties agreed to ask the Commission to approve the Regulatory Settlement and that the obligations in the Regulatory Settlement will be the only obligations sought by the parties with respect to one another regarding any change in control proceeding or the Plan, and that such obligations shall only become binding on the parties once the Commission approves the terms of the Regulatory Settlement and upon the Effective Date of the Plan. Section 1.2 provides that the parties will ask the Commission to grant the requested approvals contemporaneously with or before the bankruptcy court's confirmation of the Plan of Reorganization or such later date as the parties may agree and specifies that the Commission's approvals will not include substantive new conditions.

According to section 1.4, the terms of the Regulatory Settlement may be voided if the Commission has not issued a final order approving it and the change in control within 120 days from the date a “complete application” to change control is filed.<sup>7</sup> Moreover, if the Commission has approved the Regulatory Settlement and change in control, subject to the Plan of

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<sup>7</sup> Section 1.5 states that either party may withdraw from this docket without prejudice if Commission approval is not obtained within this time frame. The Commission has not and does not make any findings regarding the date when a “complete application” may have been filed.

Reorganization being subsequently confirmed, neither party may void the terms of the Regulatory Settlement or any approval of the change in control. Section 1.6 states that the parties will recommend that all pending dockets related to FairPoint be continued until either a party exercises its right to withdraw from the Regulatory Settlement or change in control proceedings in accordance with section 1.5 prior to Commission approval or the Effective Date of the Plan of Reorganization.

Section 2 of the Regulatory Settlement states that FairPoint will meet the broadband build-out, capital investment, and service quality program requirements of the 2008 Settlement Agreement and the 2008 Order, with specified modifications. Section 3 of the Regulatory Settlement states that the financial conditions in section 2 of the 2008 Settlement Agreement are replaced by the terms in the Regulatory Settlement, satisfied or otherwise rendered moot through the Chapter 11 bankruptcy process. Thus, except for section 2 of the 2008 Settlement Agreement and the specific modifications of the 2008 Settlement Agreement included in the Regulatory Settlement, the other provisions of the 2008 Settlement Agreement are unchanged by the Regulatory Settlement<sup>8</sup> and all the provisions of the 2008 Settlement Agreement remain in effect, including FairPoint's commitments to wholesale providers.<sup>9</sup> In addition, section 2.1.8 of the 2008 Settlement Agreement mandating quarterly reports on capital expenditures is not a "financial condition" and remains in effect.

The modifications of the 2008 Settlement Agreement described in the Regulatory Settlement can best be summarized and understood with reference to the 2008 Settlement

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<sup>8</sup> Pre-filed testimony of Kathryn M. Bailey at 2-3; hearing testimony of Ms. Bailey, Transcript of Day 2 PM hearing at 118; see also hearing testimony of Peter G. Nixon, Transcript of Day 2 PM hearing at 55.

<sup>9</sup> Pre-filed testimony of Kathryn M. Bailey at 12; hearing testimony of Ms. Bailey, Transcript of Day 2 PM hearing at 118-119.

Agreement. The Regulatory Settlement makes changes to the 2008 Settlement Agreement in four areas.

**1. Capital commitments.**<sup>10</sup> In the 2008 Settlement Agreement, FairPoint committed to making \$285.4 million in capital investments in New Hampshire through 2013. (This figure is the sum of \$254 million in general capital expense commitments and \$31.4 million of broadband-specific capital commitments.) Another \$25 million of capital commitments fulfills both general and broadband-specific commitments. *See* 2008 Settlement Agreement sections 2.11, 2.13, and 3.4. If FairPoint fails in any year to have made these investments, additional “add-on spending” is required. *See* 2008 Settlement Agreement sections 2.1.5 and 2.1.6. FairPoint also committed to invest an additional \$50 million, contributed by Verizon as part of the agreement, in New Hampshire. *See* 2008 Settlement Agreement section 2.52. In May 2009, the Commission allowed the \$50 million set-aside to be used for current operations, contingent on a new commitment of \$65 million in New Hampshire capital spending through 2012. *See* Secretarial Letter dated May 12, 2009.

**Modifications.** The Regulatory Settlement reallocates that \$65 million as follows:

\$10 million is added to the capital expense commitment based on concerns that maintenance capital expenses might otherwise be inadequate. Regulatory Settlement section 2.54. This raises the capital expense commitment from \$285.4 million to \$295.4 million.

\$4.5 million is credited for work already performed in unanticipated maintenance of inter-office facilities. Regulatory Settlement section 2.53.

Up to \$10.5 million is approved for use in achieving the 95% broadband coverage commitment by April 1, 2013, if a) the commitment is met using FairPoint’s network infrastructure rather than through third-party resellers; and b) FairPoint has otherwise exhausted its \$295.4 million capital expense commitment. Regulatory Settlement section 2.53.

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<sup>10</sup> Staff Advocate Exhibit 3 charts the 2008 capital spending commitments and most of the modifications made to the capital spending commitments.

The remaining \$40 to \$50.5 million (depending on how much if any is invested in successfully meeting the 95% broadband coverage commitment) must be spent by March 31, 2015.<sup>11</sup> The Regulatory Settlement “pre-approves” certain uses for this fund. Regulatory Settlement section 2.55.

In addition, the “add-on spending” requirements in the event of shortfalls are eliminated. Regulatory Settlement section 3.1.

**2. Broadband expansion.** In the 2008 Settlement Agreement, FairPoint committed to expanding broadband availability in three steps: first, providing coverage to 75% of its access lines by September 30, 2009, 2008 Settlement Agreement section 3.1; second, providing 85% coverage by March 31, 2010, 2008 Settlement Agreement section 3.2; and third, providing 95% coverage – including 75% coverage of the more rural “UNE 3” areas – by March 31, 2013. 2008 Settlement Agreement section 3.3. These coverage commitments were closely tied to capital expenditure commitments for broadband, see 2008 Settlement Agreement, section 3.4 – the 2008 Settlement Agreement appears to anticipate that FairPoint would achieve these coverage targets through building out its network infrastructure, which has an estimated useful life of roughly ten to thirty years,<sup>12</sup> not through reseller arrangements. The 2008 Settlement Agreement at section 3.7 also requires FairPoint to continue offering standalone DSL service, with annual price increases capped at 15%, and to continue honoring the rates and terms of Verizon’s “for life” service offerings for customers then enrolled in such plans.

**Modifications.** The Regulatory Settlement changes these commitments in three ways.

First, it extends the deadline for achieving 85% coverage from March 31, 2010, to December 31, 2010. Regulatory Settlement section 2.5.1. This affects penalties that FairPoint would pay as described below.

Second, it allows FairPoint to meet its commitment for coverage levels above 87% by reselling broadband service from other providers, provided that the resold service meets the requirements of the 2008 Settlement Agreement. Regulatory Settlement section 2.6.

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<sup>11</sup> This is an extension of fifteen months compared to the May 2009 Commission ruling.

<sup>12</sup> Hearing testimony of Brian Lippold, Transcript of Day 1 hearing at 197.

Third, it eliminates the standalone DSL price cap but preserves the requirements to offer standalone DSL and to honor “for life” programs. Regulatory Settlement section 2.4.

**3. Penalties for failure to meet broadband expansion commitments.** The 2008 Settlement Agreement establishes a penalty of \$500,000 for each full percentage point by which FairPoint misses its coverage commitments: for example, achieving 72.2% coverage versus a commitment of 75% produces a penalty of \$1,000,000. These penalties are assessed each year, and if FairPoint does not achieve the 95% commitment by March 31, 2013, these reassessments occur every six months thereafter. The penalties incurred under the 2008 Settlement Agreement are to be paid into the Telecommunications Planning and Development Fund (TPDF). See 2008 Settlement Agreement section 3.9.

**Modifications.** The Regulatory Settlement changes these penalties in two key respects;

First, by moving the commitment date for 85% coverage from March 31, 2010 to December 31, 2010, it effectively waives a penalty of approximately \$4 million that FairPoint has already incurred for failure to achieve committed coverage levels, set forth in the 2008 Settlement Agreement.<sup>13</sup>

Second, for all penalties incurred above the first \$500,000, the Regulatory Settlement allocates those penalties to FairPoint for its use to invest capital in New Hampshire over a three-year period following the penalty assessment. Only the first \$500,000 is paid to the TPDF. Regulatory Settlement section 2.7.

**4. Quality of Service (QoS) commitments.** The 2008 Settlement Agreement established fourteen individual operational metrics covering areas such as installation orders, completed on time, timeliness of answering operator calls, and correction of out-of-service problems within twenty-four hours. FairPoint committed to meet specific annual performance targets for each metric, in some instances based on a plan that ramps up expected and committed performance levels over several years. The 2008 Settlement Agreement establishes penalties in the form of credits on subsequent customer bills for failing to meet these performance metrics

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<sup>13</sup> The approximate size of the penalty incurred under the 2008 Settlement Agreement is confirmed in the hearing testimony of Jeffrey Allen, Transcript of Day 1 hearing at 194.



over the course of a calendar year. These penalties were capped at \$12.5 million per year. The penalty calculation methodology (which is clarified in Regulatory Settlement section 2.3) has not been changed from the 2008 Settlement Agreement. 2008 Settlement Agreement section 10.3.

**Modifications.** The Regulatory Settlement eliminates one of the original fourteen metrics, DSL installation times. Regulatory Settlement section 2.3.<sup>14</sup> The Regulatory Settlement preserves the penalty structure for missing QoS commitments established in the 2008 Order with these exceptions:

As noted above, broadband installation times are no longer included in the performance metrics and therefore cannot trigger penalties; and

FairPoint's \$6 million penalty for having failed to meet 2009 QoS commitments would be waived in part or in full to the extent FairPoint manages to meet a QoS subset target in 2010. Regulatory Settlement section 2.1. (The subset is simply five of the 13 remaining performance metrics.)

Potential QoS penalties for calendar year 2010 are independent of the potential 2009 waiver. Thus, FairPoint could reduce its 2009 penalties by meeting some of the 2010 QoS subset targets yet still incur new 2010 penalties for failure to meet commitments in the full 13 metrics. Regulatory Settlement section 2.2.

As to miscellaneous matters, section 4.1 of the Regulatory Settlement provides that FairPoint will attempt to hire a new Chief Information Officer by June 30, 2010. The new board of directors of reorganized FairPoint will have a supermajority of newly appointed "independent directors" who will establish a "regulatory subcommittee" to monitor compliance with the Regulatory Agreement. Section 4.2. At least one member of the new board of directors will reside in a northern New England state. Section 4.4. Under section 4.2, the lead director or

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<sup>14</sup> The DSL installation metric was difficult to measure accurately. A basic telephone service installation can be verified complete and working without customer involvement, but completing and verifying a DSL installation requires customer action. In part because of this difficulty and in part because of DSL's status as a normally unregulated service, Staff Advocates agreed to drop this metric. Pre-filed testimony of Kathryn M. Bailey at 4-5.

independent chair of the board of directors will be available to speak or meet with the Commission “where appropriate and lawful.” FairPoint will also maintain a state president who shall provide a senior regulatory presence in New Hampshire able to respond to Commission dockets involving FairPoint and regulatory telecommunications issues. *Id.* Any management bonuses will be based on a combination of financial performance (EBITDAR, i.e., earnings before interest, taxes, depreciation, amortization and restructuring costs) and quality of service performance and Staff Advocates expect that compliance with service quality metrics will be afforded significant consideration in the weighting of those categories. Section 4.6.

Under section 4.3, subject to bankruptcy court approval, FairPoint will reimburse the State for its out of pocket costs in connection with FairPoint’s Chapter 11 petition and post-petition regulatory proceedings. In addition, the State’s pre-petition costs, up to \$50,000 shall be deemed allowed under the Plan of Reorganization and shall be paid in full on the Effective Date.

Under section 4.5 of the Regulatory Settlement, FairPoint may not agree to any term in a proposed settlement with the Maine Public Utilities Commission, the Maine Office of Public Advocate, the Vermont Department of Public Service or the Vermont Public Service Board pertaining to the Plan of Reorganization or to any related approval for a change in control without offering the same term to the Staff Advocates and/or the Commission. However, FairPoint is only required to offer such term(s) to the Staff Advocates or the Commission in the event that such term(s) represent a material difference in the benefits of the Regulatory Settlement and the regulatory settlement effectuated in the other two states, considering each such Regulatory Settlement in the aggregate. *Id.*

Under section 4.7 of the Regulatory Settlement, the parties agree not to take any action in a proceeding involving FairPoint that would breach or violate the terms of the Regulatory

Settlement as long as it is force. FairPoint will not issue dividends during the two-year period following the Effective Date of the Plan of Reorganization if it has failed to pay penalties incurred for failure to meet quality of service or broadband coverage commitments when due. Section 4.8. Finally, under section 4.9, the new credit agreements relating to the new term loan and the new revolving loan facility are not to pledge assets of FairPoint-NNE other than its membership interests in VT Telco.

#### **IV. POSITIONS OF THE PARTIES AND STAFF**

##### **A. FairPoint Communications, Inc., FairPoint-NNE and Northland**

FairPoint submitted the pre-filed testimony of Alfred C. Giammarino, FairPoint Communications' Executive Vice President and Chief Financial Officer when the Petition was filed. The purpose of his testimony was to show that when FairPoint exits bankruptcy, it will have the requisite financial capability to operate successfully. Following his resignation, his testimony was adopted and sponsored by other FairPoint witnesses, including Lisa Hood, interim Chief Financial Officer.

Mr. Giammarino's testimony discussed the events leading to FairPoint's bankruptcy filing, FairPoint's business operations and the status of the bankruptcy proceeding, the proposed Plan of Reorganization, FairPoint's business plan and financial projections, and the financial basis for approving the Regulatory Settlement and the Plan of Reorganization. His testimony included a description of recent management changes and the status of FairPoint's finances. The testimony also noted that FairPoint's Plan has the support of the lenders under its pre-petition credit agreement, the leadership of FairPoint's two Northern New England labor unions, the International Brotherhood of Electrical Workers and the Communications Workers of America,<sup>15</sup>

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<sup>15</sup> The unions have now approved agreements with FairPoint. Transcript of Day 1 hearing at 99.

as well as from key advocates for the States of New Hampshire, Vermont and Maine. Pre-filed Giammarino testimony at 23, 38.

The testimony noted that FairPoint had discovered an accounting error that impacted the accuracy of interim consolidated financial statements for the first three quarters of 2009 and, accordingly, FairPoint would file amendments to the 2009 quarterly reports. Pre-filed Giammarino testimony at 12 *et seq.* According to Mr. Giammarino and Ms. Hood, the error resulted from a deficiency in the transfer of certain customer billing adjustments from FairPoint's billing platform to its general ledger and procedural deficiencies that allowed these errors to go undetected. FairPoint also concluded that certain additional customer billing adjustments should be made for the year ended December 31, 2009. The accounting error and billing adjustments were expected to result in a 3% reduction in FairPoint's previously reported revenues for the first three quarters of 2009. Nevertheless, in senior management's view, the reduction would not require any change to the projected financial information contained in the Disclosure Statement.

The testimony confirmed that FairPoint has no plans to pay dividends following its emergence from bankruptcy. In addition, the new term loan will preclude FairPoint from paying any dividends until FairPoint's leverage ratio is below 2.0 times at the beginning of a fiscal year and even then, FairPoint will only be permitted to pay dividends with its share of Excess Cash Flow, as defined. FairPoint's financial projections show that test being met only at the end of 2012. Pre-filed Giammarino testimony at 33-34.

FairPoint's overall financial objective for the Plan is to emerge from bankruptcy with a significantly strengthened capital structure that will provide the Company with ample liquidity and financial flexibility to fund all its future operating and capital expenditure requirements in

the future. Pre-filed Giammarino testimony at 36. In assessing the Plan of Reorganization, FairPoint considered several important financial and credit metrics, including total leverage, free cash flow coverage, and interest coverage. Based on its evaluation of these metrics, FairPoint concluded that the Plan provides the Company with ample liquidity and financial flexibility and enables the Company to achieve financial metrics upon emergence from bankruptcy that compare favorably to comparable companies. FairPoint stated that execution of the business plan would enable FairPoint to achieve financial and credit metrics consistent with an investment grade company in the 2011-2012 timeframe. *Id.* at 37-38.

The key business initiatives embedded in the financial projections are: (1) continued improvement in FairPoint's new back-office systems platform, (2) increased cost efficiencies and other operating cost reductions, and (3) continued build-out of VantagePoint, the next generation network. FairPoint stated that the financial projections were developed based on recent historical customer, revenue and expense results and projected forward by applying FairPoint specific and industry trends to these historical results as well as applying the expected impact of the previously described strategic business initiatives that FairPoint is in the process of implementing. Pre-filed Giammarino testimony at 39-41.

The financial projections reflect several important assumptions: (1) confirmation and consummation of the Plan on June 30, 2010, (2) continued loss of local and long distance voice customers, with average monthly revenue per customer for such services remaining relatively flat or declining slightly in the period 2010-2014, (3) declines in interstate and intrastate switched access revenues consistent with industry trends and significant increases in special access revenues driven by FairPoint's investment in VantagePoint, (4) growth in data subscribers to broadband, (5) increases in cost of goods sold, primarily access charges paid to other

telephone companies and long distance carriers for voice traffic and third party ISP service costs for data customers, and (6) declines in operating expenses other than cost of goods sold, including elimination of all integration and cutover expenses in 2010, realization of benefits from certain cost saving initiatives starting in 2010, and flat to increasing operating expenses in 2012 and 2013, consistent with inflation but offset by continued cost controls and expected productivity improvement. Pre-filed Giammarino testimony at 41-43.

The projections themselves assume a revenue decline in 2010 and revenue growth in 2011 and 2012. Revenue is projected to remain flat in 2013. The EBITDAR margin in 2010 is said to be generally consistent with the margin for 2009, and beginning in 2011, the EBITDAR margin is projected to improve. Pre-filed Giammarino testimony at 43-44. FairPoint's testimony confirmed that aggregate capital spending of \$700 million over the next four years will enable FairPoint to meet all of its broadband commitments and minimum capital commitments in the northern New England states; at the same time, the financial projections show a significant cushion compared to the ratios contained in the new term loan agreement. Pre-filed Giammarino testimony at 44. In addition, the new capital structure set out in the Plan of Reorganization will result in financial ratios at the Company's emergence from bankruptcy that compare favorably with other companies in its industry peer group, and the financial projections reflect continual improvement in the key financial ratios over the four year planning period. FairPoint stated that at emergence from bankruptcy, its financial metrics will be in line with a BB rated company, and are expected to improve to BBB in the 2011-2012 timeframe. Pre-filed Giammarino testimony at 46.

FairPoint conducted certain sensitivity testing on its projections and concluded that, despite the lower EBITDAR reflected in the sensitivities, FairPoint will still have more than

sufficient cash flow to fund all its operating costs and capital expenditures. FairPoint further concluded that the financial projections show ample cushion to absorb a significant increase in interest rates beyond those assumed. Finally, FairPoint believes that it is in a much better position today to achieve the business plan because of improvements in its overall risk profile, pointing to the near completion of the integration of the northern New England business into FairPoint, a strong senior management team, completion of the cutover from Verizon's systems to FairPoint systems, and progress on the build-out of the VantagePoint network. Pre-filed Giammarino testimony at 46-51.

In supplemental pre-filed testimony, Ms. Hood provided more information regarding the accounting errors noted previously in Mr. Giammarino's testimony. She stated that an incorrect setting of system parameters within FairPoint's Kenan billing system had caused a mismatch in the interactions of this system with FairPoint's general ledger system.<sup>16</sup> Further, she stated that a billing reconciliation process was put into place in the third quarter of 2009 and as billing errors were identified, adjustments were recorded. She stated that in conjunction with the restatement process, billing error adjustments were reported in the quarter in which the error occurred. Hood supplemental pre-filed testimony at 4.

Ms. Hood reported that the revenue adjustments amounted to approximately 2.8% of originally reported revenues for the first three quarters of 2009. She stated that in order to strengthen its financial reporting controls and procedures, the Company was arranging for a third party review of the Company's controls and procedures relating to billing, accounts receivable, and revenue reporting. Finally, Ms. Hood summarized certain features of the Plan Supplement filed on April 23, 2010, including FairPoint's intent not to reject wholesale agreements with

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<sup>16</sup> According to Ms. Hood, this problem only affected the journaling process and did not cause incorrect bills to be issued to customers.

CLECs, its proposal to add Wayne Wilson, a New Hampshire resident, to the new board of directors, and the weightings for the Success Bonus Plan performance measures. Hood supplemental pre-filed testimony at 5-8.

The pre-filed testimony of Thomas P. Nolting, Jeffrey W. Allen, Bryan Lamphere, Vicky Weatherwax, and Richard T. Murtha addressed the reorganized FairPoint's technical, operational and managerial capabilities. On May 7, 2010, FairPoint filed the rebuttal testimony of Msrs. Nolting and Murtha. Through the testimony of Ms. Weatherwax and Msrs. Nolting, Allen, Lamphere and Murtha, FairPoint argued that it had the requisite technical, operational and managerial capabilities and would continue to have those capabilities following FairPoint's emergence from bankruptcy.

Testimony provided by Mr. Nolting addressed the efforts made by FairPoint to identify and correct data inconsistencies in FairPoint's network and systems that had arisen largely as a result of cutover. Mr. Nolting described the work of the newly created revenue assurance team, the various billing audits being conducted, and the data synchronization initiative and related cross system synchronization project as evidence of FairPoint's ability to identify and resolve the issues resulting from cutover.

Mr. Allen's testimony discussed how the managerial and organizational changes within FairPoint's Northern New England operations strengthen and better align FairPoint's operations. Further, Mr. Allen highlighted recent improvements in service quality performance; a number of billing initiatives designed to improve billing accuracy; and the Company's efforts to facilitate and improve communications with customers and regulators as support for FairPoint's position that its requested actions are just, reasonable and in the public interest and will have no adverse impact. Mr. Allen points to the preservation in the Regulatory Settlement of the commitments in



the 2008 Settlement Agreement relative to broadband and service quality incentives as further support for that argument.

Ms. Weatherwax addressed the work being done by FairPoint to improve its operational systems and related business processes, including the customer delivery improvement program (CDIP) and FairPoint's plans for its systems in 2010. Ms. Weatherwax described the initiatives undertaken by the information technology group to improve service provided to customers as well as the initiatives related to data accuracy, billing and the development of FairPoint's network. Citing the many service quality benefits that customers will see as a result of the CDIP initiative, Ms. Weatherwax opined that they provided a comprehensive direction and a sound, integrated plan for addressing the systems issues FairPoint faces and she concluded that FairPoint would deliver on the needed systems changes.

The testimony presented by Mr. Lamphere focused on the work done by FairPoint to manage and respond to provisioning and flow-through issues. After describing the ongoing efforts and initiatives to improve provisioning, increase order flow-through and reduce the number of late orders as well as the results achieved thus far, Mr. Lamphere asserted that FairPoint's management of those issues demonstrates that FairPoint has the managerial and technical ability to deal with the remaining issues and run and build its business.

Through the testimony of Mr. Murtha, FairPoint provided information regarding the reorganization and refocusing of its wholesale business group. In addition, Mr. Murtha discussed the steps that FairPoint had taken to identify and resolve post-cutover issues that have affected wholesale customers, noting the many improvements that have been made. Mr. Murtha identified the various channels for communication between FairPoint and its wholesale

customers and stated that FairPoint will continue to work on wholesale issues until they are resolved.

In its post-hearing written submission, FairPoint advocated that we apply the standards of review provided by the statutes and rules specifically pertinent to their requests for Commission action. On the merits, FairPoint urged the Commission to approve the Regulatory Settlement as a whole, without modification or condition, because it is critical to FairPoint's timely and reasonable emergence from bankruptcy pursuant to a Plan of Reorganization that is viable and in the interest of the parties and consumers in New Hampshire. FairPoint stated that, as noted by Staff Advocates, the Regulatory Settlement preserves the core, central features of the 2008 Settlement Agreement and 2008 Order. FairPoint warned that if the requested approvals are not granted, the foundation of the Plan of Reorganization will be undermined and FairPoint's emergence from Chapter 11 will be seriously jeopardized. According to FairPoint, the consequences of a failure of the Plan of Reorganization to FairPoint, its customers and the parties would be highly detrimental and if approvals for the Plan of Reorganization and the Regulatory Settlement are not obtained as presented, there is a substantial risk that the bankruptcy proceedings will be prolonged and a litigated result in the Bankruptcy Court will not be as favorable to consumer interests as that presented in the Regulatory Settlement.

FairPoint described its post acquisition operational challenges leading to its bankruptcy filing, including (1) integrating its northern New England operations with pre-merger FairPoint, (2) keeping pace with competition from bundled offerings by cable companies, as well as the use of alternative technologies, which, according to FairPoint are eroding its traditional base of wireline voice customers, (3) monitoring, repairing and upgrading the existing telecommunications network in northern New England operations, while simultaneously building

a new next generation IP based network, and (4) transitioning certain back-office functions from Verizon's integrated systems to newly created systems of FairPoint at cutover in January 2009. FairPoint remarked that during this same period, the United States entered into a very serious economic decline, which reduced consumer and business spending and accelerated the rate of decline in access lines and overdue accounts receivable balances from customers. Turmoil in the financial markets accompanying the economic downturn, coupled with FairPoint's deteriorating financial performance, restricted FairPoint's ability to refinance its debt. As a result, FairPoint said, it 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 taken on to complete the acquisition.

FairPoint noted that the record of the Phase 1 Confirmation Hearing has closed and FairPoint's President testified that FairPoint does not intend to request that the Bankruptcy Court reject any portion of the Regulatory Settlement. Pursuant to the Regulatory Settlement, FairPoint has agreed that following the Effective Date of the Plan of Reorganization, FairPoint will comply with the 2008 Order and the 2008 Settlement Agreement, including the provisions regarding broadband build-out, capital investment, the service quality index program, the Performance Assurance Plan (PAP) and other provisions of the 2008 Order, subject to modifications described in the Regulatory Settlement and applicable bankruptcy law.

FairPoint stated that the Regulatory Settlement is a carefully drafted settlement among parties with critical interests and differing views and that, while each provision can be justified, the Regulatory Settlement represents a compromise among competing interests, reflecting the mutual goal that FairPoint emerge from bankruptcy quickly and on reasonable terms. In addition, FairPoint noted that the Regulatory Settlement avoids the uncertainty of potential

litigation in Bankruptcy Court over whether the various requirements and penalties constitute claims subject to discharge or executory contracts subject to rejection in bankruptcy.

FairPoint stated that it sought modifications to its northern New England regulatory obligations that would reduce its cost of operations and provide additional flexibility in the future. While the Regulatory Settlement essentially preserves the service quality commitments in the 2008 Order, at the same time, the Regulatory Settlement strikes, in FairPoint's view, an appropriate balance between requiring it to pay for failures to achieve service quality metrics and requiring it to reinvest portions of such payments into its operations. FairPoint stated that its performance on service quality metrics continues to demonstrate substantial improvement. FairPoint also reviewed what it called its extraordinary efforts to improve customer service, its initiatives to improve provisioning, increase order flow-through and reduce late orders, actions to identify and correct data deficiencies in its network and systems that were largely the result of the cutover from Verizon, and the continued focus on addressing the CLECs' concerns. FairPoint admitted the need to further improve the delivery of services to its FairPoint customers. According to FairPoint, its actions and plans demonstrate its managerial and technical competence to delivering system changes and its executives have the experience and ability to deal with remaining cutover issues and run and build the business.

Regarding broadband build-out, FairPoint emphasized that the Regulatory Settlement preserves its core commitments to invest in and substantially increase broadband availability in its service area on a scope and pace well beyond its predecessor. According to FairPoint, the broadband provisions are justified by economic reasons and the need to achieve a compromise providing economic value and business flexibility to the interested parties.<sup>17</sup> FairPoint noted that

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<sup>17</sup> FairPoint reported that it has been pursuing the engineering, design, construction and deployment of its "next generation network," which it calls VantagePoint. According to FairPoint, the core network is largely completed.

it will continue to be subject to detailed reporting requirements and to the \$500,000 penalty per percent of coverage missed provided for in the 2008 Settlement Agreement.

FairPoint stressed that when it 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. Specifically, FairPoint will have a capital structure that contains significantly less debt than heretofore as more than \$1.7 billion, or roughly two-thirds, of its existing debt will be converted into equity. This is expected to reduce its minimum debt service requirements by approximately \$175 million annually. Not only will FairPoint's financial position and liquidity be strengthened but, according to FairPoint, its operational risk will be reduced.

FairPoint verified that post-bankruptcy, 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, FairPoint warned that even a modest modification could be used by a party to withdraw support for the negotiated plan, with potentially harmful consequences. In this regard, FairPoint noted that the willingness of its creditors to forego \$1.7 billion in debt in exchange for equity in reorganized FairPoint means that they will have a substantial incentive to ensure that FairPoint succeeds, as only an increase in the share price will enable them to recoup their losses over time.

FairPoint argued against the Commission's imposition of any conditions. FairPoint specifically stated that Accion Group's recommended conditions were unnecessary. In closing, FairPoint argued the risks of imposing conditions or rejecting the requested relief significantly

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FairPoint noted that 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. FairPoint stated that VantagePoint will provide bandwidth that can support an array of new products, such as fiber to the home and other advanced services, and is designed to be scalable, providing the capability for bandwidth to be increased quickly to provide products and services to meet future business and residential customer demands. At the wholesale, institutional and business level, VantagePoint is a so-called carrier class Internet protocol/multi-protocol label switching broadband network with Ethernet transport that features a layered and ringed architecture.

outweigh any conceivable benefit that even a limited conditional approval might bring to ratepayers and wholesale customers in New Hampshire.

### **B. Staff Advocates**

Staff Advocates presented the testimony of Kathryn Bailey, Director of the Telecommunications Division of the Commission, and John Lisciandro, a Director at Deloitte Financial Advisory Services LLP. Ms. Bailey's pre-filed testimony explained the ways in which the Regulatory Settlement preserves, with certain specified modifications, the commitments FairPoint made, and the Commission relied on, in approving the transfer of assets to FairPoint in the 2008 Order. Her testimony addressed FairPoint's commitments regarding retail service quality benchmarks and penalties, DSL service quality metrics, stand-alone DSL pricing, broadband availability and penalties, capital expenditures, financial conditions and management. She recommended approval of the Regulatory Settlement and the change of control because the Regulatory Settlement preserves FairPoint's capital expenditure, broadband deployment and quality of service commitments and leaves unchanged its commitments to wholesale providers.

In his pre-filed testimony, Mr. Lisciandro explained his analysis regarding the assumptions supporting FairPoint's business plan from 2010 to 2013. He described the Plan of Reorganization and the related financial projections in terms that were generally consistent with the descriptions previously proffered by witnesses for FairPoint and Accion Group. He concluded that the 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 [favorable] differences between projected

financial ratios and debt covenants [related to the new credit facility.]”<sup>18</sup> However, similar to the cautions expressed by witnesses for Non-Advocate Staff, Mr. Lisciandro noted that,

given historical trends in operations and industry projections, the business plan appears somewhat optimistic when compared to other potential scenarios that are in line with industry trends. Under a sensitivity analysis where revenue is projected to decline year over year and profit margins are projected to remain fairly stable, projected credit ratings would indicate a company potentially more vulnerable to adverse business, financial and economic conditions; an entity that has a capital structure with higher than average leverage; and a company with much smaller differences between financial ratios and debt covenants. However, under that sensitivity analysis, debt levels are still projected to be reduced by nearly . . . million by the end of 2013, and excess cash generated over the same period would approach . . . million. In addition, in the sensitivity analysis, capital expenditures as projected by FairPoint, and which include settlement amounts as agreed to with the states, remain unchanged and are spent as projected. Assuming scheduled amortization payments are made, additional revenue declines of between . . . from the sensitivity analysis would need to occur for the Company to be in default of covenants and receive a credit rating similar to those in existence in the middle of 2009 of ‘vulnerable’ or ‘highly vulnerable.’<sup>19</sup>

Mr. Lisciandro tempered his findings by noting that that there are many other potential fluctuations in the business financials that were not included in his analysis, but which could result in a default of a covenant.<sup>20</sup> Mr. Lisciandro reviewed financial information provided by FairPoint after he completed his pre-filed testimony, but did not conduct any additional sensitivity analysis. Transcript of Day 2 PM hearing at 134-135. He also testified that FairPoint’s growth projections are above industry projections. Transcript of Day 2 PM hearing at 133. While his sensitivity analysis found that the FairPoint plan could sustain underperformance, Mr. Lisciandro performed the analysis accepting FairPoint’s assumptions as the basis for his analysis.

In their post-hearing written submission, Staff Advocates noted that they have played an active role in the bankruptcy by retaining experienced bankruptcy counsel who have attended

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<sup>18</sup> Pre-filed testimony (public version) of John Lisciandro at 25.

<sup>19</sup> Pre-filed testimony (public version) of John Lisciandro at 25-26.

<sup>20</sup> Pre-filed testimony (public version) of John Lisciandro at 26.

many hearings and meetings in New York. Staff Advocates stated that, among other tasks, they are continuing to negotiate with FairPoint and the other states, i.e., Maine and Vermont, regarding problematic language in the Plan of Reorganization, including Article XV. They stated they expect to achieve a successful resolution that will resolve any latent ambiguities and clarify the preservation of the Commission's jurisdiction to continue regulating FairPoint.

Staff Advocates argued that imposing additional conditions not contained in the Regulatory Settlement is unnecessary and creates a risk that FairPoint will not emerge from bankruptcy under the current schedule. They noted that the states have reserved the right to object to the Plan of Reorganization and would do so if anything adverse happened on FairPoint's end and that there is very little chance that the bankruptcy process will result in a Plan of Reorganization that is different from that currently proposed. In lieu of Accion Group's first and third suggested conditions, Staff Advocates recommended that the Commission enter an order approving the Regulatory Settlement and change in control specifying that the order is entered and effective contemporaneously with the Bankruptcy Court order confirming the Plan of Reorganization.

Regarding the part of Accion Group's third condition that the Commission's approval be conditioned on FairPoint's non-rejection in bankruptcy of the provisions that apply to the CLECs in the 2008 Settlement Agreement, Staff Advocates urged that FairPoint does not intend to modify these provisions and nothing in the request for approval of the change of control or the Regulatory Settlement purports to affect these provisions. They emphasized that the scope of this docket does not extend to adjusting the economic issues between the CLECs and FairPoint or to resolving any operational issues between them.



Staff Advocates further stated that Accion Group's fourth suggested condition regarding an agreement by FairPoint that any condition added by the other states be included in New Hampshire's order is unnecessary because of section 4.5 of the Regulatory Settlement. Staff Advocates also stated that the Commission may be able to review the other states' orders and take such action necessary to achieve a level playing field among the states that would be consistent with the Regulatory Settlement.

Finally, Staff Advocates argued against Accion Group's recommendation that a monitor be selected by the Commission. They stated that in view of Commission Staff's capability and the existence of appropriate tools at their disposal, an outside monitor is not justified or necessary as an additional condition. They also pointed out that the Commission is always free to obtain independent experts to assist in its investigations and regulatory oversight and, more generally, that post bankruptcy, the Commission has its full set of regulatory tools with which to direct and encourage FairPoint to meet its regulatory goals.

Staff Advocates stressed that the Regulatory Settlement maintains key pre-bankruptcy commitments of FairPoint and the Commission has sufficient regulatory tools to enforce those commitments post-bankruptcy. Moreover, they stated that their testimony demonstrates that the Regulatory Settlement and the Plan of Reorganization will allow FairPoint to emerge from its reorganization and continue performing the numerous regulatory commitments it made in Docket No. DT 07-011. In particular, they pointed to the testimony by Mr. Lisciandro and the Accion Group witnesses that the reorganized FairPoint has a reasonable business plan for performing its financial commitments post-bankruptcy and the new credit facility does not prevent FairPoint from meeting its projected capital improvements and broadband infrastructure build-out post-bankruptcy.

### **C. One Communications Solutions of New Hampshire**

One Communications is a competitive local exchange carrier providing service in New Hampshire through its licensed subsidiaries: CTC Communications Corp.; Lightship Telecom LLC; Choice One of New Hampshire, Inc; and Conversant Communications of New Hampshire LLC. All of its subsidiaries conducting business in New Hampshire provide retail telecommunications services in large part by obtaining unbundled network elements, interconnection, collocation and other wholesale services from FairPoint.

While One Communications filed no testimony in this proceeding, it did file a post-hearing written submission on June 4, 2010. In its filing, One Communications urged the Commission to closely review FairPoint's proposals and address the remaining systems, performance and other competitive issues prior to any approval of FairPoint's requests. Arguing that the Commission should not approve the proposed reorganization, including the change in control and the Regulatory Settlement, without imposing conditions that specifically address competitive issues, One Communications noted neither One Communications nor any of the other CLECs were parties to the Regulatory Settlement or otherwise involved in the discussion that led to the settlement. Therefore, conditions are necessary to ensure that the competitive telecommunications market in New Hampshire is not impaired by approval of the proposed reorganization, change in control, and Regulatory Settlement.

In support of its recommendation that conditions be imposed, One Communications argued that FairPoint's actions since cutover make it clear that FairPoint is committed only to attempting to dilute its wholesale service quality requirements. Citing examples of how FairPoint has construed its obligations under the 2008 Order and 2008 Settlement Agreement in Docket No. DT 07-011 to have changed as a result of the proposed reorganization, One

Communications opined that FairPoint should not be allowed to pick and choose which provisions of the merger order it remains subject to and requested that the Commission, as part of any approval, clearly affirm that FairPoint remains bound by all the wholesale requirements imposed by the Commission in its 2008 Order and that it may not seek to undo any those requirements. It is One Communication's position that such affirmation is necessary given, in part, FairPoint's statements that it is considering rejection of its interconnection agreements with CLECs as part of the bankruptcy process, notwithstanding that FairPoint is required by the Commission to have these existing agreements remain in place for a specified period of time which has not yet expired. See Exhibits OC-1, OC-2, OC-6, OC-17, FP-25 and Transcript of Hearing Day 1 at 74.

One Communications questioned whether the post-bankruptcy FairPoint will be able to resolve the post-cutover problems that the pre-bankruptcy FairPoint could not and whether the post-bankruptcy FairPoint could become the company the Commission expected it to be when FairPoint received approval to purchase Verizon's northern New England assets two years ago. Referencing FairPoint's performance and actions in the time since cutover occurred in February 2009, One Communications argued that FairPoint will not do either without the imposition of the specific requirements One Communications is recommending.

The conditions proposed by One Communications to be part of any Commission approval are as follows:

1. Require FairPoint to withdraw with prejudice its request for retroactive modification of the PAP in DT 09-113 in which FairPoint seeks to reduce by 65% the dollars at risk subject to service quality penalties;
2. Require an independent audit of FairPoint's wholesale service quality metrics reporting as was envisioned by the 2008 Settlement Agreement in DT 07-011;

3. Extend the three year stand still requirements for an additional reasonable period of three years beyond their expiration date; and
4. Assure that independent verification of reports and FairPoint's progress continue, utilizing Liberty Consulting Group not just to monitor and report but also to provide recommendations to the Commission, FairPoint and the parties on problem resolution.

**D. Comcast Phone of New Hampshire, LLC**

Comcast Phone is a competitive local exchange carrier doing business in New Hampshire and is a wholesale customer of FairPoint Communications. Although Comcast Phone did not file testimony in this proceeding, it did file a post-hearing written submission on June 4, 2010.

In its June 4, 2010 filing, Comcast Phone took no position on whether the Commission should grant the approvals requested by FairPoint. Rather Comcast simply requested that, in the event the Commission granted the requested approvals, FairPoint be ordered to abide by all of its current obligations to its New Hampshire wholesale customers. Such direction is necessary given FairPoint's repeated statements that, while it is not FairPoint's intent to do so, it is possible that FairPoint could reject its interconnection agreements with Comcast Phone and other CLECs at any time up to and including the Effective Date of FairPoint's emergence from bankruptcy.

Referencing the wholesale obligations contained in the CLEC settlement adopted as part of the overall settlement agreement approved by the Commission in the 2008 Order, Comcast noted the Commission found in that order that "FairPoint's agreement to extend the interconnection agreements for three years, to cap all wholesale rates for three years, and to not seek changes in existing wholesale obligations for three years provides significant regulatory certainty for competitors." Citing testimony provided at hearing by FairPoint witnesses Hood and Skrivan, Comcast Phone argued that it now finds itself in the position where the certainty created by the provisions of the 2008 Order, the 2008 Settlement Agreement and the CLEC settlement is undermined by FairPoint's continued reservation of its right to reject Comcast

Phone's interconnection agreement in the bankruptcy. Therefore, Comcast asserted, the Commission should ensure FairPoint not utilize the bankruptcy process to avoid any of the wholesale obligations imposed by the Commission in Docket No. DT 07-011 by ordering FairPoint to keep in place its interconnection agreements with all CLECs for the period specified in the CLEC settlement and to continue to abide by all of the wholesale obligations in the CLEC settlement, the 2008 Settlement Agreement and the 2008 Order until such time as the Commission expressly relieves FairPoint of any such obligation.

**E. segTel, Inc.**

segTEL is a competitive local exchange provider in New Hampshire that obtains wholesale services from FairPoint. segTEL filed the testimony of Kath Mullholand on April 9, 2010 and also filed a post-hearing written submission jointly with BayRing on June 4, 2010.

Through the testimony of Ms. Mullholand, segTEL identified problems that it has experienced since the cutover from Verizon's systems to FairPoint's systems. While Ms. Mullholand noted that those problems do not occur today at the same rate and severity as they did immediately following cutover, she stated that significant problems still occur. Ms. Mullholand commented that despite more than a year of asserted industrious activity on the part of FairPoint, FairPoint's systems still fail in many key areas.

segTEL also argued that there is a lack of parity between retail service and wholesale services, with FairPoint providing superior service to itself and its retail customers to the detriment of its wholesale customers. Further, segTEL asked the Commission to consider that the current management of FairPoint was essentially the same as the management that made promises in Docket No. DT 07-011 and questioned whether those promises would be kept this

time around. In her testimony, Ms. Mullholand recommended the Commission only approve the requested actions if it imposed the following conditions:

1. Requiring FairPoint to keep the existing PAP in place for at least five years;
2. Restoring the dollars at risk under the PAP to the levels that were established when Verizon's PAP was first approved in New Hampshire;
3. Ordering an investigation to determine whether the PAP currently measures and reports all the relevant metrics that were required of Verizon;
4. Establishing a 60-day timetable to initiate a complete audit of the existing PAP by a reputable independent third-party acceptable to the CLEC community, to include in-depth validation and verification of 100% of the PAP metrics, reporting methods and penalty calculations;
5. Requiring FairPoint, within thirty days of approval of the reorganization plan, to update its dark fiber offering in New Hampshire to comply with FCC rules for the provision of dark fiber as a UNE;
6. Ordering FairPoint to cease collection efforts and threats of disconnection on all pre-petition CLEC invoices;
7. Petitioning the Federal Communications Commission to revoke FairPoint's Section 271 authority to provide interLATA services unless and until FairPoint can show that its CLEC OSS is functioning in complete compliance with LSOG rule and Verizon's stated service guidelines prior to April 1, 2007;
8. Requiring FairPoint to continue to honor its current agreements with CLECs for at least five years; and
9. Such other conditions as the Commission may find reasonable.

**F. BayRing Communications, Inc.**

BayRing is a competitive local exchange carrier providing voice and broadband services to customers throughout New Hampshire, using its own facilities in combination with leased unbundled network elements through interconnection agreements with FairPoint-NNE.

BayRing's customers include small and medium size businesses and enterprise customers.

Wendy Wilusz filed testimony in this proceeding on behalf of BayRing on April 19, 2010. On June 4, 2010, BayRing filed a post-hearing written submission in conjunction with segTEL.

In her testimony, Ms. Wilusz expressed concern that the Regulatory Settlement filed in this proceeding did not acknowledge or address the current degraded levels of wholesale service being provided by FairPoint. Ms. Wilusz acknowledged Staff Advocate's position that the Regulatory Settlement left unchanged the terms of the CLEC settlement but went on to express her concern about FairPoint's sincerity given their unwillingness to currently abide by the commitments in that settlement. Ms. Wilusz provided numerous examples in support of her position and stated that it was difficult to believe that FairPoint was willing to abide by the terms imposed by the Commission in the 2008 Order or the terms of CLEC settlement, approved as part of that order, given BayRing's experience with FairPoint.

Ms. Wilusz recommended the Commission not approve the Regulatory Settlement or, alternatively, that it should only approve the Regulatory Settlement if it was revised to explicitly restate FairPoint's commitments regarding wholesale service as provided in the CLEC settlement, to extend the timeframes for those commitments and to extinguish FairPoint's hopes to reduce or recover PAP monies for past or future poor service.

In the post-hearing written submission filed jointly by segTEL and BayRing, both companies continued to argue that the imposition of conditions were necessary to find the Regulatory Settlement in the public interest. BayRing and segTEL asserted that not only did it and other CLECs not obtain the benefits that were promised by FairPoint during the proceeding in Docket No. DT 07-011, but they also continue to experience ongoing problems with FairPoint.

BayRing and segTEL argued that FairPoint, acting on its own, failed to deliver on its commitment to provide service equal to or better than Verizon. Accordingly, the Commission

should set forth the necessary conditions that will force FairPoint to reach these service level commitments. In addition, the Regulatory Settlement must be just, reasonable and in the public interest. As the Regulatory Settlement does not represent the interest of the CLECs, the Commission again must impose conditions to ensure that there is parity between retail and wholesale services. Pointing to the testimony provided by the CLECs, BayRing and segTEL concluded that FairPoint's systems and operations as a whole continue to have serious and numerous flaws that need to be addressed. As further support for Commission imposed conditions, BayRing and segTEL suggested, however, that FairPoint is not prepared to make the additional investment that will be required, given all of its financial difficulties.

BayRing and segTEL further argued that the evidence shows that FairPoint has undertaken a strategy designed to unravel the protections guaranteed to CLECs in the CLEC settlement and expressed support for the conditions outlined in the testimony of Accion Group on behalf of Non-Advocate Staff. BayRing and segTel also proposed the following conditions to address the issues identified in their post-hearing written submission:

1. Reversal of any PAP/C2C metrics alterations, as well as a moratorium on any future implementation of any changes to PAP/C2C metrics from the metrics remediation without Commission authorization;
2. Reject FairPoint's efforts to recover retroactive PAP to ensure that FairPoint has some incentive to provide quality services to wholesale customers;
3. Third party testing of FairPoint's OSS similar to what VZ was subjected to in gaining its 271 approval;
4. Prevent FairPoint from recovering from CLECs in rates the cost incurred to implement the OSS changes caused by the transition from Verizon systems;
5. Extend the rate freeze and other timelines in the CLEC settlement to a new five year period from the date of FairPoint's emergence from bankruptcy;
6. Implement an investigation into FairPoint's treatment of its wholesale customers;



7. Provide a clear and unequivocal mandate of FairPoint's obligation to provide services to CLECs at a level equal to what it provides itself and its retail customers; and
8. Other terms that the commission believes are necessary to protect wholesale CLEC customers from further harm.

**G. CRC Communications of Maine, Inc.**

CRC is a competitive local exchange carrier in New Hampshire that has interconnection arrangements with FairPoint. In order to serve its customers in New Hampshire, CRC utilizes unbundled access to certain wholesale facilities and services from FairPoint. CRC stated that it depends upon FairPoint for prompt, efficient, reliable wholesale service to meet its obligations to its customers. CRC filed the testimony of Nicholas Winchester and Ed Tisdale on April 19, 2010 and a post-hearing written submission on June 4, 2010.

In its testimony, CRC echoed the comments of other CLECs, providing numerous examples of how FairPoint has yet to return to business as usual and describing how FairPoint's failure to bring its operations in line with pre-cutover service levels has materially impacted CRC's business and its ability to support its customers and their telecommunications needs.

In its post-hearing written submission, CRC expressed concern that CLECs continue to experience significant problems with wholesale provisioning and billing issues more than 15 months after the cutover from Verizon's systems to FairPoint's systems. Of significant concern to CRC is FairPoint's claim that the system conversion is over, and there is no need to budget monies for years beyond 2010 for cutover-related systems fixes. Pointing to testimony provided by FairPoint witness Skrivan during the hearings, CRC raised a concern that FairPoint would seek to recover costs associated with its systems and modifications from its wholesale and retail customers.

Despite its concerns, CRC did not oppose approval of FairPoint's application for approval of reorganization, noting that the reorganization will result in significant de-leveraging of FairPoint's operations which should put FairPoint in a place where it is better able to meet its service obligations to both retail and wholesale customers. However, CRC urged the Commission to monitor FairPoint's wholesale operations closely and, once FairPoint emerges from bankruptcy, take any and all appropriate steps to ensure that FairPoint's wholesale operations meet state, federal and industry standards.

#### **H. Otel Telekom, Inc.**

Otel is a competitive local exchange carrier offering telecommunications services in New Hampshire in part by obtaining unbundled network elements, interconnection, collocation, and other wholesale services from FairPoint. Otel filed no testimony but did file a post-hearing written submission on June 4, 2010.

Otel argued that FairPoint cannot show that the Regulatory Settlement is just and reasonable, that it serves the public interest, nor that there is no adverse impact on rates, terms, conditions or operations in New Hampshire. Otel opined that the systems and process problems FairPoint has experienced since cutover are notorious. Echoing the comments made by One Communications, BayRing and segTEL, Otel noted that CLECs have yet to receive the benefits of the CLEC settlement negotiated in Docket No. DT 07-011 and supported an extension of the terms of that agreement. Otel stated that such an extension was necessary to alleviate, in part, the adverse impacts that wholesale customers have suffered and continue to suffer. Like CRC, Otel pointed to the efficiency and productivity losses that it and other CLECs have experienced, the increased costs of doing business, and the loss of business and business opportunities that have resulted from the cutover to FairPoint's systems.

Otel also expressed concern that FairPoint had not included monies in its budget for cutover related issues beyond 2010. Arguing that Otel's experience with cutover has demonstrated that FairPoint and its consultants continually underestimate the scope, complexity and costs of system developments and the remediation efforts necessary for FairPoint to perform at a satisfactory level, Otel questioned whether it was realistic to expect FairPoint to fully restore service quality to acceptable levels. Otel further questioned whether FairPoint's service quality measurements could be trusted and stated that the C2C and PAP metrics are an essential barometer of FairPoint's service quality to wholesale customers and it is crucial that those metrics be trustworthy.

As did BayRing and segTEL, Otel asserted that there was a lack of parity between FairPoint's retail customers and its wholesale customers. In its comments, Otel focused specifically on the lack of parity in FairPoint's back-billing policy. According to Otel, back-bills present significant problems for CLEC wholesale customers of FairPoint. Reviewing back-bills is a time intensive process, and the level of effort is compounded when the bill covers multiple months. FairPoint already imposes a time limit on the period for which it will back bill. However, that time period is different for FairPoint's retail customers than for FairPoint's wholesale customers. While retail customers are back-billed for a period no longer than 180 days, wholesale customers are back-billed for a period of one year.

Given the many problems it described, Otel respectfully suggested that in order to find the Regulatory Settlement just and reasonable and in the public interest and that proposed change of control will have no adverse impact on rates, terms service or operations in New Hampshire, the Commission must impose the following conditions:

1. Extend the duration of certain conditions in the 2008 Settlement Agreement governing FairPoint's relationships with its wholesale customers;

2. Establish an escrow to ensure funding of unfinished systems or process remediation projects;
3. Require an independent audit of FairPoint's performance and reporting under the C2C and PAP;
4. Impose a time limit on back-billing that does not discriminate between FairPoint's retail and wholesale customers; and
5. Require that the role of the independent monitor of cutover, systems and process issues be continued at FairPoint's expense.

#### **I. Level 3 Communications, LLC**

Level 3 is a competitive local exchange carrier that, according to its pre-filed testimony, provides telecommunications and information services to New Hampshire retail and business customers, including dial up Internet, high speed data, wireless transit, Voice over the Internet (VoIP) services and transit services to wireless carriers, and serves a pre--eminent education institution by means of its own fiber network. Level 3 expressed concern about the terms and conditions that would apply to traffic exchanged between Level 3 and FairPoint if, during the bankruptcy process, its existing interconnection agreement with Level 3 were rejected. In addition, Level 3 questioned whether the Commission has considered how any changes in the economic relationship between Level 3 and FairPoint (or any other competitive provider and FairPoint) are reflected in the Regulatory Settlement. Subsequently, however, Level 3 moved to withdraw, stating that it had reached a settlement with FairPoint and no longer opposes the unconditional approval of the Petition. Level 3 took no further part in the proceedings.

#### **J. RNK, Inc. d/b/a RNK Telecom**

Although RNK petitioned the Commission to intervene, it did not participate actively in the proceedings. It did not file any pre-filed testimony, took no part in the hearing and did not file any post hearing written submission.

**K. DIECA Communications, Inc. d/b/a Covad**

Although Covad petitioned the Commission to intervene, it did not participate actively in the proceedings. It did not file any pre-filed testimony, took no part in the hearing and did not file any post hearing written submission.

**L. Irene Schmitt by New Hampshire Legal Assistance**

Irene Schmitt is a low-income residential basic exchange customer of the Company. On her behalf, New Hampshire Legal Assistance stated at the pre-hearing conference that it was seeking assurance that the Company would continue to honor the commitments made in the Memorandum of Understanding between FairPoint and New Hampshire Legal Assistance dated October 13, 2007 and referenced in the Commission's 2008 Order at pages 70-71, and specifically, the commitments made regarding the Lifeline and Link-Up federal telephone assistance programs, soft dial tones ensuring access to 911 emergency service even when telephone service is disconnected, advance notice before removing public payphones and public interest payphones, and the installation and maintenance of additional public interest payphones. New Hampshire Legal Assistance participated in the hearing and filed a post-hearing closing statement. Based on the statements made in the Petition, the Regulatory Settlement, the Plan of Reorganization, a separate memorandum of understanding entered into with OCA (see Exhibit E to the Plan of Reorganization), hearing testimony of FairPoint and Staff Advocates, and FairPoint's assumption in the bankruptcy proceedings of the Memorandum of Understanding dated October 13, 2007, New Hampshire Legal Assistance did not object the relief requested in the Petition.

**M. Office of Consumer Advocate**

OCA entered into a memorandum of understanding with FairPoint dated February 5, 2010, stating that, based on the commitments made by FairPoint in the Regulatory Settlement, the OCA will not oppose the Regulatory Settlement and will not advocate that third parties oppose the Regulatory Settlement or the relief requested from the Commission pursuant to the terms of the Regulatory Settlement. OCA participated at the hearing by cross examining certain witnesses but did not file a post-hearing written submission.

**N. Accion Group on Behalf of Non-Advocate Staff**

Accion Group was engaged on behalf of Non-Advocate Staff to perform certain review and analysis work related to the reasonableness of the Plan of Reorganization, with a primary focus on the financial and operational elements of the Plan. Three witnesses testified. The witnesses presented two pre-filed reports: (i) a preliminary review of the Plan of Reorganization and financial projections included as part of the Disclosure Statements, its operational restructuring, and the actions taken by FairPoint to correct fiber optic installation issues and (ii) a supplemental report with their findings related to the Plan Supplement to the Second Amended Plan of Reorganization. The Accion Group also reviewed the decision by FairPoint to reject certain payphone contracts as a part of the Plan.

At the request of Non-Advocate Staff, Mr. Ronald Cassel, a fiber optic engineer engaged by Accion Group for purposes of this engagement, reviewed the integrity of FairPoint's new fiber deployment in New Hampshire and the remedial actions taken to correct installation errors. Report of Accion Group (public version) filed with Accion Group's testimony on April 21, 2010 (Accion Report) at 22. This review was conducted in response to certain allegations in an

anonymous e-mail<sup>21</sup> sent to the Commission and included in the scope of this docket. Mr. Cassel stated that the fiber optics cable deployed by FairPoint is suitable for the climate and intended purpose. He also found that the identified problem was due to an installation error resulting from improper training of personnel and that FairPoint took proper steps to correct the deficiencies. Mr. Cassel concluded that this is not a systemic problem and should not recur and, in short, the issue described in the anonymous email should not have any impact on FairPoint utilizing its installed base of fiber or in deploying its broadband initiatives. *Id.* at 22-26.

Mssrs. Alan Kessler and Raymond Gross reviewed the financial and operational aspects of the Plan of Reorganization. They stated that if FairPoint achieves the primary goals and objectives underlying the projected results set forth in the Amended Disclosure Statements as further developed in the Plan Supplement, the Company will have sufficient capital to execute the business and operational plans. See Accion Group Report at 2; Supplemental Report of Accion Group (public version) filed on May 17, 2010 (Accion Group Supplemental Report) at 2. At the same time, they expressed reservations about FairPoint's ability to achieve its projected revenue goals. In their reports and testimony, they stressed that FairPoint's ability to achieve the assumptions in the Plan of Reorganization would be challenging in light of changes faced by all operating companies in the telecommunications industry. At hearing, Mr. Gross testified that the industry faces significant declining revenue due to reductions in demand for traditional landline and related services. Transcript of Day 3 hearing at 13. Mr. Gross testified that based on industry experience, direct costs are expected to decline in line with declining revenues, but operational costs typically do not since a significant portion of total expenses are "fixed" and thus do not increase or decrease with changes in total customers or revenue. *Id.* at 14. As an

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<sup>21</sup> The e-mail asserted that FairPoint incorrectly spliced certain new fiber optic cable such that micro-bends in the cable would not pass light.

example, Mr. Gross stated that under the Plan of Reorganization, a 10% negative miss in revenue could result in a much greater negative impact on EBITDA, i.e., earnings before interest, taxes, depreciation and amortization, and cash flow. *Id.* at 15. Mr. Gross also testified that the success of the Plan will also depend on achieving the projected build-out of the network, as that network will provide the structure enabling the Company to deliver broadband and other related services. *Id.* at 16.

In the Accion Group Supplemental Report, Msrs. Kessler and Gross stated that FairPoint's supplemental filings did not materially alter the findings and conclusions set forth in the initial Accion Report. *Id.* at 14. They stated that the credit facility terms and conditions were fair and reasonable and that the overall structure and cost of Success Bonus Plan appear to be reasonable in the context of this reorganization. *Id.* at 5, 14. In addition, they stated that the Long Term Incentive Plan appears to be designed to reward the achievement of clearly defined metrics and desired results. *Id.* Further they stated that in large, complex bankruptcies use of a Litigation Trust<sup>22</sup> is not unusual. They stated that because the amount of FairPoint's contribution to the Litigation Trust is capped, the arrangement should not adversely affect FairPoint's ability to meet its obligations and commitments. *Id.* at 10.

They reiterated that revenue attainment continues to be the most significant challenge they have identified and stated that while the financial projections show the Company establishing stability in revenue performance, the business plan lacks specificity regarding the actions the Company expects to take to ensure that projected revenue levels and related metrics are realized. *Id.* at 14. They concluded that FairPoint will remain financially viable, but at risk, for a number of years. *Id.* at 15.

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<sup>22</sup> In this case the Litigation Trust is being created to hold claims FairPoint may have against Verizon. In the event the Litigation Trust recovers moneys, the proceeds will be used first to repay FairPoint for its contribution and then to pay two creditor classes. Accion Group Supplemental Report at 10.



Mr. Gross reviewed the impact of FairPoint's decision to reject certain payphone contracts between the Company and various owners and managers. See Accion Group Supplemental Report at 10-11. FairPoint asserts that its decision resulted from its inability to accurately account for the incentives paid to property owners under the contracts. Mr. Gross indicated that without the incentive payments, one motivation for providing space and maintenance would be reduced or eliminated and even though FairPoint intends to maintain the payphones, this arrangement can be expected ultimately to have a negative impact on the phone locations and their usability. *Id.* at 10-11, 14. Mr. Gross noted that a potential solution would be to sell the payphone business line to a suitable payphone operator. *Id.* at 14.

The Accion Group witnesses recommended adoption of several conditions by the Commission, including the confirmation of the Plan of Reorganization without significant change, the confirmed Plan does not reject terms included in the 2008 Settlement Agreement or the Regulatory Settlement, FairPoint's extension to New Hampshire of any conditions imposed by Maine or Vermont that the Commission believes are appropriate for New Hampshire, and required monitoring of FairPoint operational progress for at least one year. Accion Group Supplemental Report at 15.

In its post-hearing written submission, Accion Group stated that the information regarding FairPoint's 2009 financial results in its Form 10K filed on May 28, 2010 did not change Accion Group's view that FairPoint will be better positioned to meet its obligations and commitments after emerging from bankruptcy. Accion Group reiterated its belief that achievement of FairPoint's goals provided for in the Plan of Reorganization are possible, but will be challenging and will require specific and immediate actions targeted at customer retention to reduce the steady decline in the demand for traditional services. Accion Group also noted the

importance of a focused plan to grow the customer base through the offering of new products and services that will become available as FairPoint completes its network build out, and the possible need to implement a more aggressive expense reduction plan if revenue continues to lag behind projections. *Id.* at 1. In Accion Group's view, FairPoint will need to out-perform its past experience and possibly current industry trends to achieve planned objectives and will need to move aggressively after the Effective Date in order to achieve the projections for 2010 and 2011. *Id.* Accion Group further reiterated that the most significant challenge in achieving planned results for 2010 and beyond lies in the attainment of revenue.

FairPoint reported net revenue for 2009 that was 3% below the planned revenue for 2010. As noted in Mr. Gross' hearing testimony, revenue misses have an even greater negative impact on EBITDA and cash flows, and based on FairPoint's testimony regarding the size of its fixed costs, Accion Group estimated that if FairPoint were to miss its revenue projections by 10%, the result could result in a negative impact on EBITDA of more than 20%. Accion Group post-hearing written submission at 2. Accion Group noted that FairPoint's planned 2010 capital expenditures are approximately \$200 million with cash interest expense of \$65 million and thus significant misses in revenue could increase the risk that FairPoint will not have adequate capital to complete the build out of the network infrastructure and service the new credit facility. In turn, if the Company fails to build out its network as planned and on time, its ability to achieve planned revenue would be further impacted. That revenue for 2009 was 11.60% below the reported revenue for 2008 further underscores the challenges faced by FairPoint. *Id.* at 3.

Accion Group's post-hearing written submission also clarified its recommendation that the Commission monitor FairPoint's performance regarding critical operating metrics that are the primary sources and causes of the results and are ultimately reported on FairPoint's quarterly and

annual financial statement as filed with the Securities and Exchange Commission. Accion Group recommended that the Commission monitor the performance of these metrics on a monthly basis and listed certain types of data that would help the Commission to understand FairPoint's performance against planned projections.

## V. COMMISSION ANALYSIS

### A. 2008 Settlement and 2008 Order and Subsequent Events

Following the hearing in Docket No. DT 07-011, the Commissioners expressed concerns in public deliberations about Verizon's proposal to transfer its local exchange and long distance businesses in New Hampshire to FairPoint. 2008 Order at 1, 16. In response, the Joint Petitioners and Staff entered into the 2008 Settlement Agreement, which established a comprehensive set of terms and conditions governing the transfer. Among the most important terms were commitments to be observed by FairPoint following the transfer, including but not limited to commitments to wholesale providers and a level of investment in broadband facilities. *Id.* at 20-37. After a hearing on the 2008 Settlement Agreement, the Commission approved the Joint Petition, subject to the terms of the 2008 Settlement Agreement and as further conditioned by the Order. *Id.* at 89.

The Commission considered a number of public benefits to be realized as a result of the transfer. *Id.* at 70. In addition to the provisions regarding retail rates and service offerings, the Commission agreed with the OCA that Verizon had demonstrated no intention of achieving Commission-established service quality standards and that Verizon was responsible for poor management of pole attachment requests and an "unconscionable" backlog of double poles.<sup>23</sup> *Id.*

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<sup>23</sup> A double pole is a second utility pole standing next to the first, typically installed in response to damage, deterioration, or a need for expansion. The first pole should be removed when installation of the second is complete, but in thousands of cases the process was never completed.

at 71. The Commission found FairPoint's commitments to improving service quality and substantially reducing the backlog of double poles to be significant public benefits. *Id.* at 72.

The Commission also found that FairPoint's commitments to broadband availability represented an extensive build-out of broadband infrastructure by a telecommunications provider with a utility franchise. *Id.* at 78. The Commission recognized that a fiber-based build-out was unlikely to attract investor capital to rural areas and did not consider FairPoint's intention to rely on DSL and not fiber to the premises in the near term to be a basis to reject the transaction. *Id.* at 79. Referring to Verizon's testimony that the three northern New England states were not priority states for Verizon and that it intended to focus the roll-out of its fiber based product in larger markets, the Commission observed that rejecting the transaction would not result in Verizon deploying more fiber in New Hampshire. *Id.* The Commission concluded that FairPoint's commitment to bringing broadband service to virtually all corners of the state in a reasonable time was a persuasive addition to FairPoint's argument that the transaction was in the public interest. *Id.*

FairPoint acquired the northern New England operations of Verizon on March 31, 2008. For the first ten months of FairPoint control, Verizon continued to perform back office operations on behalf of FairPoint – that is, data processing functions such as processing new orders for retail and wholesale customers, tracking service order status, and billing. Verizon performed these services under a temporary “Transition Services Agreement” (TSA) while FairPoint and its subcontractor Capgemini developed a new back office system to replicate the functionality Verizon provided. During this ten-month period the service provided by FairPoint to its retail and wholesale customers was on par with the service Verizon had delivered.

Verizon was eager to complete its TSA responsibilities and devote its resources to its own operations, and FairPoint was eager to begin operation of its own system and terminate the payments to Verizon under the TSA. Following a substantial testing procedure monitored by consultants on behalf of the Commission, FairPoint initiated a “cutover” from the TSA process to its own systems in late January 2009. This cutover resulted in a substantial deterioration in many aspects of retail and wholesale operations regarding service changes, billing, and call center responsiveness. Despite deterioration in these operations, the performance of the telephone network in placing and carrying calls promptly and reliably did not suffer.

In addition to the gradual migration of customers away from traditional landline telephone service – a trend across the industry and present with both Verizon and FairPoint – FairPoint experienced financial pressures created by its cutover problems. Customer migration was greater than expected and attempts to fix the problems with the new system, and to provide workarounds in the meantime, added unexpected operational costs. These problems also limited FairPoint’s ability to undertake new marketing initiatives to increase its business. All of these factors, as well as the general economic downturn, contributed to FairPoint’s inability to meet its debt service obligations and the necessity of filing in bankruptcy.

There is no question that the benefits expected from the transfer to FairPoint in 2008 have not been fully realized. A Plan of Reorganization, based in part on the proposed regulatory approvals from the northern New England states, awaits confirmation by the Bankruptcy Court.<sup>24</sup> Consistent with the purpose of Chapter 11 of the Bankruptcy Code, the Plan of Reorganization represents a fresh opportunity for a reorganized FairPoint to achieve the promise envisioned for its operations in New Hampshire, Maine and Vermont and, as noted by Staff Advocates, to

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<sup>24</sup> See Order Under Bankruptcy Code Sections 105(a) and 1129 and Bankruptcy Rules 3019(a) and 9014 Regarding Plan Confirmation Process, issued by the Bankruptcy Court for the Southern District of New York on May 14, 2010.

satisfy the substance of the commitments it made to the State of New Hampshire in obtaining the Commission's approval for the transfer as set forth in the 2008 Order. Pre-filed testimony of Kathryn Bailey at 12.

### **B. Approvals Sought**

FairPoint seeks approval of the Regulatory Settlement and, as required by RSA 365:28, the modifications to the 2008 Order and the 2008 Settlement approved in the 2008 Order that are described in the Regulatory Settlement. As FairPoint notes, the applicable standard of review for a settlement presented to the Commission for approval is whether "the result is just and reasonable and serves the public interest." N.H. Code Admin. Rules Puc 203.20(b). RSA 365:28, which governs modifications of Commission orders, does not set forth a standard; recognizing that the Commission's authority under this statute is broad, FairPoint stated that the standard is whether the modifications comport with "due process and are legally correct."

The Petition also seeks approval of the change in control of FairPoint Communications, Inc., as parent company of FairPoint-NNE and Northland, pursuant to RSA 369:8, II(b), which requires a finding that the transaction will not have an adverse effect on the public utility rates, terms service or operation of FairPoint-NNE and Northland within New Hampshire. While there are a number of significant changes associated with FairPoint's emergence from bankruptcy that arguably relate to control of the parent company, including wholesale changes in stock ownership of the parent and changes in the makeup of the board of directors, FairPoint specifically refers to the likelihood that one entity, Silver Oak Capital LLC, will have an ownership interest of 10% or more of the reorganized parent company when the Plan of

Reorganization becomes effective.<sup>25</sup> In its post-hearing written submission, FairPoint stated that implementation of the Plan of Reorganization may thus result in a “restructuring” or “acquisition” under RSA 369:8, II<sup>26</sup> and/or a “transfer” under RSA 374:30.<sup>27</sup> *Id.* at 11. As noted, RSA 369:8,II, requires a finding that the transaction will not “adversely affect rates, terms, service, or operation” of the public utility; RSA 374:30 requires a finding that the transfer of a public utility’s “franchise, works or system” serves the “public good”. FairPoint asserted that the “public good” standard under this statute is in essence a “no net harm” standard, under which the Commission must approve the proposed transaction if the public interest is not adversely affected. *Id.* at 7.

Finally, FairPoint seeks approval of the pledge of FairPoint’s membership interests in VT Telco to the secured lenders of FairPoint Communications, pursuant to RSA 369:2,<sup>28</sup> which requires a “public good” finding, citing *Appeal of Easton*, 125 N.H. 205 (1984). We note that the 2008 Settlement Agreement prohibits any mortgage, pledge or encumbrance of FairPoint-NNE’s assets, see 2008 Order at 36, one of which is its membership interests in VT Telco. Because the 2008 Settlement was approved by the 2008 Order and thus was effectively incorporated in the 2008 Order, the proposed pledge also requires our approval as a modification of an order pursuant to RSA 365:28. We also note that section 4.9 of the Regulatory Settlement states that the new credit agreements will provide that none of FairPoint-NNE’s assets shall be

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<sup>25</sup> In their post-hearing written submission, see page 1, Staff Advocates referred to the change in control as the replacement of existing equity security owners with new ones in conjunction with the write-down of over \$1 billion of debt, which is being converted to equity.

<sup>26</sup> Corporate parent restructurings are referenced in RSA 369:8, II(a) and mergers and acquisitions are referenced in RSA 369:8, II(b).

<sup>27</sup> FairPoint did not cite RSA 374:33, the statute which grants the Commission regulatory authority over the acquisition by a public utility or a public utility holding company as defined of more than 10 percent (or less in limited circumstances) of the stocks or bonds of another public utility or a public utility holding company. The standard of review for such an acquisition is whether it is “lawful, proper and in the public interest.”

<sup>28</sup> In its post-hearing written submission, FairPoint stated that it did not concede that RSA 369:2 applied.

mortgaged or pledged (except for the membership interests of VT Telco) to secure the obligations of FairPoint thereunder. In effect, the provision allowing the pledge is one of the terms of the Regulatory Settlement.

BayRing and segTEL urged a broader approach to describing the standard of review. They argued that the public interest standard articulated in the 2008 Order is the proper framework for the Commission's analysis of all the various requests set forth in the Petition and that the Commission should consider all the important interests at stake, including the CLECs interests, to determine what is reasonable. Post-hearing written submission of BayRing and segTEL at 3, 5.

### **C. Discussion**

The applicable standard of review for a settlement proposal is whether "the result is just and reasonable and serves the public interest." N.H. Code Admin. Rules Puc 203.20(b). In general, the Commission encourages parties to attempt to reach a settlement of issues through negotiation and compromise as it is an opportunity for creative problem solving, allows the parties to reach a result more in line with their expectations, and is often a more expedient alternative to litigation. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 (May 29, 2009) at 48. However, even where all parties join a settlement agreement, the Commission cannot approve it without independently determining that the result comports with applicable standards. *Id.* The issues must be reviewed, considered and ultimately judged according to standards that provide the public with the assurance that a just and reasonable result has been reached. *Id.* Moreover, the Commission scrutinizes settlement agreements thoroughly regardless of whether a party appears at hearing to raise objections. *Id.*



As to modifications of Commission orders, RSA 365:28 sets forth certain procedural requirements but does not identify a standard of review. In the absence of specific language, we apply a public interest standard. The requested modifications are contained in a settlement, which, as noted above, incorporates the public interest standard and it is appropriate that proposed modifications of the 2008 Settlement be reviewed under the same public interest standard employed in the review of the original settlement. As well, we are satisfied that the public interest standard comports with due process and is legally correct.

FairPoint invokes RSA 369:8, II(b) and RSA 374:30 for the proposed change in control. We will assess whether the transfer will “adversely affect rates, terms, service or operation” of FairPoint as required by RSA 369:8, II(b) and, further, whether the transfer of the franchise is in the public good as required by RSA 374:30.

Regarding the proposed pledge of FairPoint-NNE’s membership interests of VT Telco, we find that both RSA 369:2 and RSA 365:28 apply. We need not, however, parse the fine distinctions between a public good standard under RSA 369:2 and a public interest standard as we reach the same result under both standards.

### **1. Regulatory Settlement and 2008 Order Modifications**

When presented with a proposed settlement, we must evaluate the substantive terms as well as the process that led to a negotiated agreement. The fact that parties to a settlement agreement represented a diversity of interests, and that issues were diligently explored and negotiated at length, serves as one indication that the results of the settlement are reasonable and in the public interest. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 (May 29, 2009) at 48.

FairPoint, by modifying the 2008 Settlement Agreement through new terms in the Regulatory Agreement, seeks to reduce its cost of operations and provide additional flexibilities enabling it to operate successfully, including extending the period of time to comply with required investments. FairPoint post-hearing written submission at 16. Staff Advocates, representing the interests of the citizens of New Hampshire and with the assistance of experienced bankruptcy counsel, seek to preserve, to the extent possible, the commitments made to the State of New Hampshire in the 2008 Settlement Agreement. It is apparent that each of the parties to the Regulatory Settlement share as a common goal FairPoint's quick emergence from bankruptcy on acceptable terms. The OCA, representing the interests of residential customers, and New Hampshire Legal Assistance, representing the interests of a low income residential customer, do not object to the Regulatory Settlement. The CLECs are not parties to the Regulatory Settlement. Some of them urge rejection of the Regulatory Settlement or approval only with significant conditions. Thus, the Regulatory Settlement is not a compromise agreed to by every affected party. The fact that a diversity of interests are reflected in the terms of the Regulatory Settlement, however, and that it does not change any of the terms of the 2008 Settlement Agreement specifically affecting the CLECs are factors that bear in favor of the reasonableness of the Regulatory Settlement.

As to the merits of the Regulatory Settlement, we first consider whether the terms, by themselves, are reasonable.<sup>29</sup> The Regulatory Settlement does not confer public benefits beyond those identified in the 2008 Order and in some instances delays realization of the commitments made in the 2008 Order. The question therefore is whether the Regulatory Settlement maintains enough of FairPoint's commitments from the 2008 Settlement Agreement and 2008 Order that, in the context of a company in bankruptcy, it could be found to be in the public interest.

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<sup>29</sup> We discuss the issues raised by the requested conditions to our approval in a separate section below.

A bankruptcy proceeding involves major modifications to the financial and operational obligations of the debtor. Regulatory commitments may receive more deference than other obligations by the court but that deference is not absolute. It is extremely important to the State that the investments mandated by the 2008 Order be realized. The Commission found that they served the public interest in 2008; enabling a reorganized FairPoint to meet these commitments further serves the public interest. Allowing them to be invalidated by the Bankruptcy Court would serve no public purpose and be a blow to the telecommunications future of the State. The Regulatory Settlement substantially reaffirms the commitments FairPoint made in the 2008 Settlement Agreement regarding wholesale service and retail service, capital investment, broadband expansion, and other matters in New Hampshire.

The Regulatory Settlement makes concessions to FairPoint in several areas. For example, FairPoint is currently subject to penalties of \$6 million for service quality lapses based on its performance through December 31, 2009, and approximately \$4 million for not meeting its broadband expansion commitment for March 31, 2010. The Regulatory Settlement gives FairPoint a fresh start in both areas. If FairPoint meets its commitments on a subset of service quality metrics through December 31, 2010, the \$6 million penalty is waived. The March deadline for broadband expansion is extended to December 31, 2010, and the out-of-pocket penalty exposure is capped at \$500,000. These concessions improve FairPoint's ability to attract capital, which is a benefit to the Company and strengthens its ability to meet its commitments. More to the immediate point, however, is that improved service and broadband expansion are critical to the Company's viability. Thus FairPoint's interest in operating a financially strong company that is responsive to its customers needs is in general accord with Commission and state policies and should drive steady progress in these areas. To the extent the Company fails to

make adequate progress or takes actions inconsistent with such policies, the Commission will exercise its traditional regulatory authority.

In the context of bankruptcy reorganization, we conclude that the Regulatory Settlement reasonably preserves the commitments made by FairPoint in the 2008 Settlement Agreement and approved by the Commission in the 2008 Order. A related question concerns FairPoint's ability and willingness to live up to the Agreement. The issue is whether FairPoint's business prospects and management incentives are such that FairPoint will be in a position to satisfy the commitments approved in the 2008 Order, as modified by the Regulatory Settlement, and thus that the Regulatory Settlement should be approved.

There is no dispute that the reduction of approximately \$1.7 billion in debt, from \$2.7 billion to \$1 billion, will substantially improve FairPoint's balance sheet and its financial flexibility. According to FairPoint, it will also result in a reduction of annual interest costs from approximately \$208 million to \$65 million, or about 69%, and that total leverage will be reduced from approximately 7.5 times to 2.7 times adjusted EBITDAR. FairPoint post-hearing written submission at 10. The revolving credit facility will provide FairPoint with additional liquidity beyond that available through the term loan. Giammarino pre-filed testimony at 32. Accion Group confirmed that the Plan of Reorganization will result in FairPoint's emergence from bankruptcy with a capital structure that will provide it with sufficient resources and adequate access to capital at reasonable rates to successfully execute the Plan of Reorganization, including meeting its commitments in New Hampshire, assuming that FairPoint performs at or near projected levels as it emerges from bankruptcy. Accion Group Report at 4. Accion Group cautioned, however, that significant deviations from projected results, such as earnings

deficiencies of 20% or more from projected levels could impair FairPoint's ability to provide service at reasonable or expected levels. *Id.*

According to FairPoint, the financial projections contained in the Plan of Reorganization were developed based on actual results as of July 2009. Giammarino pre-filed testimony at 41; Hearing testimony of Lee Newitt, Transcript of Day 1 hearing at 77. The revenue figures from July 2009 did not reflect the later restatement of revenue of the Form 10-Qs for quarters 1, 2, and 3 of 2009. The restatement of those quarters resulted in revenue reduction of \$25 million, roughly 2.85% of the \$879 million in total revenue originally reported. FairPoint 10-QA for period ending September 30, 2009, issued April 30, 2010. Despite this reduction to actual revenue used as the foundation for its projections, FairPoint stated it did not believe any change to the projected financials was required. Giammarino pre-filed testimony at 14.

In their post-hearing written submission, Staff Advocates point to Mr. Lisciandro's testimony that "reorganized FairPoint has a reasonable business plan for performing its financial commitments post-bankruptcy and the new credit facility does not prevent FairPoint from meeting its projected capital improvements and broadband infrastructure build-out." Similarly, Accion Group's witnesses Kessler and Gross stated in their pre-filed testimony that their review "suggests FairPoint will be able to meet the commitments made in the Regulatory Settlement." At the same time, the witnesses, not unexpectedly, qualified their positions in some regards and pointed to circumstances that could negatively affect revenue and earnings expectations. Nevertheless, they agree that the Company's financial position is markedly improved. For instance, Staff Advocates assert in their post-hearing written submission that the Plan of Reorganization, "will allow FairPoint to emerge from its reorganization and to continue performing the numerous regulatory commitments it made to the Commission and to the people

of New Hampshire.” Further, Accion Group in its post-hearing written submission stated that its “position remains that FairPoint will be better positioned to meet its obligations and commitments after emerging from bankruptcy. Furthermore, we continue to believe that the achievement of the company’s goals provided for in the Plan of Reorganization are possible but will be challenging.” See Accion Group post-hearing written submission at 1.

While FairPoint’s future business prospects and financial success are not assured, there is a reasonable basis to conclude that FairPoint will be able to meet its commitments under the Regulatory Settlement. Rejecting the Regulatory Settlement under these circumstances is not a responsible step. Rejection would not strengthen the financial or operational capabilities of FairPoint and could leave the State without the benefit of the commitments negotiated in the Regulatory Agreement.

A related issue concerns FairPoint’s operational ability to perform. FairPoint’s pre-filed testimony details the Company’s on-going efforts to improve the performance of its back-office operations, which control service order processing and billing for retail and wholesale customers. The inadequacy of those systems at cutover and thereafter is well documented. Since the January 2009 cutover, however, FairPoint has sought to remedy its operational deficiencies by, among other things, engaging multiple consulting firms to correct the back-office failures that have plagued wholesale and retail customers. The difficulties that persist cannot be attributed to a lack of attention or to stinting on resources.

A major contributor to post-cutover problems was the magnitude of the conversion process itself – the transition from some 600 legacy Verizon in-house systems to approximately sixty new FairPoint commercial systems with custom software interconnecting them. The results suggest that FairPoint may have underestimated the magnitude of the challenge it faced in that

transition. Successful cutover required complex support systems for wholesale and retail operations, with management empowered to command corporate resources and strategy to resolve the problems. The Regulatory Settlement calls on FairPoint to recruit a new Chief Information Officer, which has been done. The new CIO, Kathleen McLean, has experience in both operational support systems and the wholesale side of the business. She testified that she is getting the executive support and financial resources necessary to fix the back office systems. Hearing testimony of Kathleen McLean, Transcript of Day 2 AM hearing at 53.

Despite an unacceptably slow start in resolving its systems problems, FairPoint is now realizing performance improvements and making staffing changes that appear to improve its ability to succeed. There is nothing in the Regulatory Settlement to hinder further improvement in FairPoint's operations.

In reviewing the reasonableness of the Regulatory Settlement, we also consider whether the new shareholders, who initially will be secured creditors under the Plan of Reorganization, are likely to behave in ways that are adverse to FairPoint's long term interests and the interests of its northern New England customers. While we cannot predict how they will in fact behave, the Plan of Reorganization contains incentives for shareholders to maximize the value of their shares and thus shareholders have a stake in the Company's long-term success that is not significantly different from debt holders.

We consider as well whether the Plan of Reorganization contains management incentives that provide reasonable assurance that FairPoint will continue to meet its commitments in New Hampshire and carry out its service obligations as a regulated utility. Section 4.6 of the Regulatory Settlement provides that management bonuses shall be based on a combination of EBITDAR and service quality metrics goals, with the weighting for each clearly stated in the

incentive and bonus plans. Accion Group reviewed the terms of FairPoint's Success Bonus Plan and its Long Term Incentive Plan described in the Plan Supplement. Accion Group Supplemental Report at 3, 5-6. The Success Bonus Plan offers one-time cash payments to incentive key personnel to stay on the job during bankruptcy and to implement the Plan of Reorganization. Bonus payments under the Success Bonus Plan are based on a formula using EBITDAR and service quality metrics. The Long Term Incentive Plan is an equity-based incentive compensation plan intended to enhance FairPoint's ability to attract highly qualified personnel, strengthen its customer retention capabilities, enhance the long-term performance and competitiveness of the Company and align the interests of plan participants with those of shareholders. Accion Group concluded that the Success Bonus Plan structure and cost are reasonable in the context of the reorganization and that the Long Term Incentive Plan is reasonable and designed to advance FairPoint's fiscal and operational strategies and goals. *Id.* at 5-6, 14. We agree with those conclusions.

In addition to these incentives for executives and other employees, the Regulatory Settlement maintains disincentives that directly affect the Company's bottom line. Lapses in retail service quality trigger time-limited rate reductions to retail customers. Lapses in wholesale service quality trigger penalties payable to wholesale customers under the PAP. Failure to meet broadband expansion commitments triggers additional capital spending commitments.

These disincentives, however, are less stringent than in the 2008 Settlement Agreement. The Regulatory Settlement includes one-time conditional waivers for the Dec. 31, 2009 Service Quality commitment (it can be reduced in part or in whole if FairPoint meets a more limited set of service quality commitments by Dec. 31, 2010) and for the March 31, 2010, broadband commitment (whose deadline is extended to Dec 31, 2010.) The Regulatory Settlement also



relaxes slightly the retail service quality commitment and resultant penalty exposure by removing DSL installation times from the scorecard. The Regulatory Settlement also relaxes the broadband coverage penalty, by allowing FairPoint to retain all such penalty amounts beyond the first \$500,000 for use in capital investment within three years, which on the other hand, can inure to the benefit of customers.

The Regulatory Settlement also includes a provision to ensure that FairPoint pays penalties for failure to meet service quality and broadband commitments: during the first two years following the effective date, if these penalties are not paid when due, FairPoint cannot issue dividends. These provisions apply appropriate pressure on FairPoint to meet its commitments in a timely way.<sup>30</sup>

Consistent with section 4.1 of the Regulatory Settlement, as previously noted, FairPoint has hired a Chief Information Officer with previous experience in information technology and business operations of a major telecommunications company. In accordance with section 4.4 of the Regulatory Settlement, FairPoint has already appointed a New Hampshire state president who we will expect to provide a senior regulatory presence in the State able to reasonably respond to Commission dockets and regulatory telecommunications issues as required by section 4.4. More recently, FairPoint has hired a CFO who reportedly has a substantial depth of experience in high tech industries, including telecommunications.<sup>31</sup> The management of the reorganized FairPoint, therefore, appears stronger than in the past.

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<sup>30</sup> The dry optic fiber splicing problem described in the anonymous e-mail received at the outset of these proceedings does not appear to be an impediment to FairPoint's ability to satisfy its broadband commitments in New Hampshire. According to Accion Group, the problem is not a systemic one and FairPoint's management appropriately responded by instituting a training program designed to avoid a repetition of the problem. We consider this issue no longer to be relevant to this proceeding.

<sup>31</sup> See FairPoint News Release at [http://www.fairpoint.com/Images/06%2029%2010%20-%20FairPoint%20Names%20New%20CFO%20News%20Release%20-%20FINAL\\_tcm52-9645.pdf](http://www.fairpoint.com/Images/06%2029%2010%20-%20FairPoint%20Names%20New%20CFO%20News%20Release%20-%20FINAL_tcm52-9645.pdf).

Furthermore, the Plan of Reorganization, when implemented, will result in the current board of directors being replaced with a new board. As noted by Accion Group, the new board members have extensive experience in the telephone, information technology and finance industries. Accion Group Supplemental Report at 3-4. Their specific experience in information technology, telephone and ILEC wholesale operations represent a significant strengthening of the board of directors. One of the new directors, Wayne Wilson, brings relevant business experience to the Board and, as a New Hampshire resident, a local perspective. His appointment will also satisfy a provision of section 4.4 of the Regulatory Settlement. In addition, under section 4.2 of the Regulatory Settlement, the new board is required to appoint a “regulatory subcommittee” responsible for monitoring compliance with the 2008 Order as modified by the Regulatory Settlement and all other regulatory matters involving the northern New England states. On the basis of the foregoing, we find the Regulatory Settlement to serve the public interest and will approve it.

## **2. Change in Control**

One narrow aspect of the change in control for which FairPoint seeks approval is the likelihood that, based on the current make-up of FairPoint’s secured indebtedness, one entity, Silver Oak Capital LLC, will have an ownership interest of 10% or more of the reorganized parent company when the Plan of Reorganization becomes effective. At hearing Ms. Hood testified that FairPoint expected Silver Oak’s stock ownership to be approximately 15% at the Effective Date. Hearing testimony of Lisa Hood, Transcript of Day 1 hearing at 31. FairPoint argues that, even if that occurs, no single investor will be in a position to control FairPoint; further, Company policy will be made by the new board of directors, which will be diverse, independent and not controlled by Silver Oak. Assuming that Silver Oak’s stock ownership is

not significantly greater than 15%, we agree that its ability to influence FairPoint's business policies and practices is likely to be limited.

More broadly, however, the Chapter 11 Reorganization represents both a change in control consistent with that contemplated under RSA 369:8, II and a franchise transfer consistent with RSA 374:30. Accordingly, we look also to the standards set forth in those statutes. As for the change of control effectuated by the Bankruptcy Court Reorganization, we consider whether there will be an "adverse effect of rates, terms, service, or operation." The purpose of a Chapter 11 Reorganization is to put the debtor in a better position than it was previously and enable but not guarantee success. Section 362 of the Bankruptcy Code provides an automatic stay of proceedings against the debtor and Section 1121 provides the debtor sufficient time to file a plan of reorganization. Correspondingly, the Bankruptcy Court has broad jurisdiction and expansive powers to administer the proceeding and confirm a plan.

The "no adverse effect" standard under RSA 369:8, II provides for a change in control so long as things are no worse off as a result of a transaction. A Chapter 11 Reorganization seeks to make a debtor, and effectively its customers in this instance, better off. RSA 369:8, II therefore is compatible with the Bankruptcy Court's duties relative to a reorganization. As noted above, the facts of this reorganization, in large part the \$1.7 billion reduction in the Company's debt burden, support a finding that reorganization will have no adverse effect. Accordingly, we find that, subject to the terms of this Order, the change in control is reasonable and in the public interest.

As for RSA 374:30, in these circumstance the transfer of the franchise to the reorganized entity, in essence, effectuates the change in control. To the extent the change in control comports with the relevant statutory standard, the transfer of the franchise may be regarded as for

the public good. Since there is no basis for concluding that the reorganization will have an adverse effect on rates, terms, services or operation, we find the transfer of the franchise to be for the public good.

### **3. Pledge of VT Telco**

No party opposed FairPoint–NNE’s pledge of its membership interest in VT Telco. VT Telco does not do business in New Hampshire, it does not add to the financial or managerial strength of FairPoint-NNE, and its assets are not used to provide telephone service in New Hampshire. Hearing testimony of Lisa Hood, Transcript of Day 1 hearing at 33-35, 76. Accordingly, we find that, subject to the terms of this Order, the pledge is reasonable and in the public interest.

### **D. Proposed Conditions**

Several parties recommended that we impose conditions on any approvals. Accion Group, testifying on behalf of Non-Advocate Staff, recommended the following conditions:<sup>32</sup>

1. The Plan be confirmed by the Bankruptcy Court without significant change from that which was filed with the Bankruptcy Court on April 23, 2010.
2. The Plan that is confirmed by the Bankruptcy Court does not reject any terms of (a) the 2008 Settlement Agreement, as modified by the Regulatory Settlement, (b) the Regulatory Settlement with any conditions or restrictions the Commission may include or (c) Stipulated Settlement Terms by and among FairPoint Communications, Inc., Freedom Ring Communications, LLC d/b/a BayRing Communications, LLC, segTEL, Inc., Otel Telekom, Inc. and National Mobile Communication Corporation d/b/a Sovernet Communications,” filed as Exhibit 2 to the 2008 Settlement Agreement.
3. In the event regulatory approvals in Vermont or Maine include conditions or requirements that the Commission believes would be appropriate in New Hampshire, FairPoint agrees to extend those conditions or requirements to its operations in New Hampshire.

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<sup>32</sup> In its post-hearing written submission, Accion Group withdrew its previous recommended condition that when the first quarter 2010 operational and financial results are made available to the Commission, they are determined to be consistent in all significant ways with the projections presented in the Disclosure Statement.

4. In addition to the Commission's monitoring of broadband implementation, FairPoint retain for at least a year a monitor selected by the Commission to assess FairPoint's efforts to achieve the revenue projections and operational improvements.

Staff Advocates point out that the basic concept underlying the first two conditions is that Commission approval should be granted on the basis that the situation in bankruptcy as it existed at the time of our hearing not change before the Plan of Reorganization is confirmed by the Bankruptcy Court, which is expected to be in July. The goal to be achieved by these conditions is certainly reasonable. We have been asked to grant the requested approvals in large part on the basis of the specific Plan of Reorganization submitted to us. In addition, we would not have engaged in this process if we had understood that the 2008 Settlement Agreement, including Exhibit 2, and our approval of the Regulatory Settlement could later be undone through a rejection of the 2008 Settlement Agreement or the Regulatory Settlement. Staff Advocates and FairPoint both argue that the conditions are unnecessary; Staff Advocates recommend, however, that, in order to provide additional security and ensure consistency, the Commission specify in its order that approval is effective contemporaneously with the Bankruptcy Court order confirming the Plan of Reorganization. Staff Advocate's recommendation is consistent with section 1.2 of the Regulatory Settlement.

We concur with Staff Advocates' view that there is minimal risk that the Plan of Reorganization would be changed in a material way that is adverse to New Hampshire's interests. To be certain, however, we direct FairPoint to file a copy of any and all modifications to the Plan of Reorganization and any rejection of the 2008 Settlement Agreement or the Regulatory Settlement at the time such filings are made in the Bankruptcy Court. Accordingly, this Order is entered and effective contemporaneously with confirmation of a Plan of

Reorganization that does not materially adversely affect FairPoint's ability to meet the terms of the Regulatory Settlement.

Staff Advocates contend that Accion Group's third recommended condition is also unnecessary in light of section 4.5 of the Regulatory Settlement. They state, without elaboration, that the Commission may have the authority to review the Maine and Vermont orders and take necessary action to effectuate an "even playing field" among the states that would be consistent with the Regulatory Settlement as currently proposed. Staff Advocates' post-hearing written submission at 7.

Section 4.5 prohibits FairPoint from agreeing to or accepting any term in a proposed settlement with the Maine and Vermont regulatory authorities that would be materially more beneficial than those contained in the Regulatory Settlement, without offering the same term to the Staff Advocates and/or the Commission. We find this sufficient protection for New Hampshire's interests and will not adopt Accion Group's recommendation

Accion Group's fourth recommended condition relates to the retention of an outside monitor to review the implementation of all steps taken by FairPoint to achieve its revenue projections and operational improvements. We cannot say today what level of monitoring will be needed as FairPoint emerges from bankruptcy. We will not adopt this recommendation though we fully expect to scrutinize the performance of FairPoint in the months ahead consistent with the traditional parameters of our regulatory authority.

In its post-hearing written submission, Staff Advocates expressed concern that Article XV of the Plan of Reorganization<sup>33</sup> provides too much jurisdiction to the Bankruptcy Court on a retained basis. Staff Advocates state that this provision is subject to the reservation of rights contained in Article XIV, entitled Exculpation, Release, Injunction and Related Provisions<sup>34</sup> and existing law governing the separation of powers and the rights of states in the federal system. We agree with Staff Advocates' interpretation.

The issue raised by Staff Advocates, *i.e.*, the preservation of the Commission's authority to regulate FairPoint, is a critical one. The issue, however, is resolved by the Company's letter filed on July 1, 2010. The letter makes clear that the Commission's jurisdiction over the reorganized FairPoint and the regulatory commitments made in the bankruptcy process is not diminished going forward. The letter represented that the Staff Advocates concurred in the provisions and that FairPoint's secured lenders find the provisions acceptable.

We welcome the confirming correspondence and proposed amendments to the Plan of Reorganization. We reject, however, the notion that jurisdiction would apply only upon Commission approval. The Commission's jurisdiction is not a matter to be negotiated. FairPoint President Peter Nixon testified to the post-bankruptcy jurisdiction of the Commission over the

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<sup>33</sup> Article XV, entitled Retention of Jurisdiction, provides in part: "[t]he Bankruptcy Court shall have exclusive jurisdiction of all matters in connection with, arising out of or related to the Chapter 11 Cases and the Plan pursuant to, and for the purposes of, sections 105(a) and 1142 of the Bankruptcy Code, including, without limitation, to: . . . (h) hear and determine disputes or issues arising in connection with the interpretation, implementation or enforcement of the Plan, the Confirmation Order, the Litigation Trust, any transactions or payments contemplated hereby or thereby, any agreement, instrument, or other document governing or relating to any of the foregoing or any settlement approved by the Bankruptcy Court; *provided, however*, that any dispute arising under or in connection with the New Credit Agreement shall be determined in accordance with the governing law designated by the New Credit Agreement.

<sup>34</sup> Section 14.2, entitled Releases, and 14.4, entitled Injunction Or Stay, currently provide in part: "[f]or the avoidance of doubt, this Section [14.2/14.4] shall not limit the implementation of a Regulatory Settlement or, as to the business and activities of FairPoint as conducted on and after the Effective Date of the Plan, the application and enforcement of applicable law in the respective states for which there is a Regulatory Settlement (consistent with the provisions of the Regulatory Settlements) with respect to the regulation of FairPoint by any governmental unit of the respective states including, if applicable, the MPUC, VPSB and/or the NHPUC."

reorganized FairPoint and its regulatory commitments; the July 1 2010 letter identifies the amendments to the Plan of Reorganization that will confirm our jurisdiction.

We turn next to the conditions requested by the CLECs. Following the January 2009 cutover from Verizon, FairPoint's performance in order acceptance, tracking, completion, and billing deteriorated to unacceptable levels and has not yet fully recovered. FairPoint's wholesale customers in particular have suffered. The CLECs have proposed a number of conditions that they assert could help remedy this situation.

We recognize that the concerns raised by the CLECs are serious and FairPoint's continued inability to resolve them will create further hardship on the CLECs and to FairPoint itself, as wholesale transactions are a significant part of FairPoint's revenue stream. The question is not whether FairPoint's management of its wholesale operations must improve significantly, but whether the reorganization docket is the appropriate forum to develop the tools that will be most effective.

The conditions the CLECs seek involve further audit or monitoring, revocation of FairPoint's Section 271 authority, ruling on PAP changes proposed by FairPoint in Docket No. DT 09-113, a limit on back-billing, establishment of an escrow account for wholesale back-office systems and a commitment that FairPoint will not terminate current wholesale agreements. We will address them in turn:

One Communications, segTEL, BayRing, and Otel ask us to condition any approval on an independent audit of the PAP. Because FairPoint has already agreed to such an audit (see section 9.4 of the 2008 Settlement Agreement), we see no need for an audit condition herein. As noted above, we continue to have the authority to monitor, investigate and audit FairPoint's performance and need not impose any conditions the bankruptcy reorganization to that effect.



SegTEL proposes that we petition the FCC for removal of FairPoint's 271 authority to provide interstate long distance service. One Communications, segTEL, and BayRing ask that we reject the PAP changes proposed in Docket No. DT 09-113. Otel seeks a time limit on back-billing to ensure non-discrimination between retail and wholesale operations. In all of these matters we need the opportunity to develop a full record, following our standard procedures. We will not, as part of the bankruptcy reorganization, make determinations on these matters.

Otel also proposes that we require FairPoint to establish an escrow account for completing fixes to its back-office systems. This proposal appears to be based on a concern cited by several other CLECs, regarding FairPoint's claim that its fixes are so nearly complete that it need not include line items for such work in subsequent years. We will not require an escrow account, but emphasize again that FairPoint is required to meet its wholesale commitments.

Comcast proposes that we condition approval on a FairPoint commitment to maintain current wholesale agreements. This appears to reflect a general CLEC concern regarding FairPoint's reservation of authority to reject regulatory settlements, potentially including interconnection agreements, up to the Effective Date of the Reorganization. We note that any such rejection would violate FairPoint's commitment and the Commission's order incorporating the 2008 Settlement Agreement (2008 Settlement Agreement, Section 9.3). Under New Hampshire law, FairPoint would need Commission approval to make such a change; we need not examine any prospective hypothetical change today.

The schedule in this docket has been extremely compressed, due to the time pressures imposed by the federal bankruptcy court proceeding, and the issues presented to us for approval have in large part been determined by the terms of the Plan of Reorganization and the Regulatory Settlement. Numerous FairPoint-related dockets have been held in abeyance since the Company

first sought bankruptcy protection. And we have been faced with an unusual situation in which our Director of Telecommunications has been unable to consult with her own staff on FairPoint-related matters, having been designated a Staff Advocate because of her role on the State's negotiating team. The issues have been complex and we see no basis for or value in tying the issues raised by the CLECs to this docket and all of its constraints. The wiser course is to bring this proceeding to an end and address in our normal course the regulatory matters that the CLECs, FairPoint, or others identify as we move forward.

#### **E. Payphones**

NHLA initially raised concerns in connection with FairPoint's rejection of contracts for certain payphones installed in New Hampshire. In its post-hearing written submission, however, NHLA did not object to the Plan of Reorganization, in part because of FairPoint's assumption in the bankruptcy proceedings of the Memorandum of Understanding dated October 13, 2007. FairPoint continues to be bound by our payphone and public interest payphone rules. Accordingly, there is no need to take further action regarding payphones in this docket.

#### **F. Extension of Broadband Deployment Deadline**

Consistent with our approval of the Regulatory Settlement in this Order, we grant FairPoint-NNE's motion for an interim suspension of the March 31, 2010 broadband deployment deadline, effective upon final confirmation of the Plan of Reorganization that includes the Regulatory Settlement. The Regulatory Settlement provides that the March 31, 2010 broadband deployment deadline is extended to December 31, 2010. Thus, assuming the Regulatory Settlement is finally confirmed in connection with the Plan of Reorganization, the March 31, 2010 broadband deployment deadline is extended to December 31, 2010 by virtue of the terms of the Regulatory Settlement.

## VI. CONCLUSION

FairPoint has failed to meet the obligations it made in 2008 to the states of New Hampshire, Maine and Vermont and their citizens. Among other things, FairPoint made promises about service quality, relations with wholesale competitors and broadband build-out, and committed itself to performance superior to Verizon, whose performance had become an issue of increasing concern in the three states. Due to FairPoint's widespread operational shortcomings arising from its systems cutover, however, residential and business customers, as well as wholesale customers and competitors who rely on FairPoint services, endured even poorer service quality than was the case under Verizon. As a result of its operational problems, general industry trends and a severe economic downturn, FairPoint lost large numbers of customers and its revenues declined to a level where it could not meet its financial obligations to its lenders. Consequently, FairPoint filed for protection under Chapter 11 of the U.S. Bankruptcy Code in October 2009, which permits it to reorganize and provides the reorganized entity a fresh start.

The critical financial element of FairPoint's Plan of Reorganization is the agreement by FairPoint's secured lenders to reduce the Company's debt from \$2.7 billion to \$1 billion, including the discharge of unsecured debt. In return, secured lenders will be issued new common stock in the reorganized entity and a new board of directors will be installed. The Plan of Reorganization has been approved by FairPoint's creditors, and filed for approval by the Bankruptcy Court. The Plan of Reorganization has also been supported by representatives of the States of New Hampshire, Maine and Vermont as parties in interest in the bankruptcy proceeding.

It is clear that the elimination of \$1.7 billion in debt places the reorganized FairPoint in a far better financial position. Moreover, because of their equity interest in the reorganized entity the lenders have a direct economic interest in the Company's success and through the new board of directors they will have the ability to influence that success. The Bankruptcy Court must also consider the feasibility of the Plan of Reorganization. Section 1129 (a) (11) of the Code specifically provides that the Bankruptcy Court shall confirm a plan of reorganization only if "the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor." As a result, the interests of lenders and new management in developing and executing a feasible plan of reorganization are closely aligned with the Bankruptcy Court's duty to only approve a plan of reorganization that is feasible.

The critical regulatory element of the Plan of Reorganization from the New Hampshire Public Utilities Commission's perspective is the New Hampshire Regulatory Settlement. FairPoint asks the Commission to approve the change of control that will occur as part of the Bankruptcy Reorganization and it asks that the Commission find the Regulatory Settlement to be just and reasonable.

The crux of the review of the change of control of FairPoint under New Hampshire law as it relates to this reorganization centers on determining whether there will be an adverse effect on rates, terms, services, or operations. Reducing the Company's debt burden from \$2.7 billion to \$1 billion and providing lenders an equity interest in the reorganized entity clearly put the Company in a far better financial position. It is therefore difficult to ascertain a basis for determining that reorganization will have an adverse effect on rates, terms, services or operations.

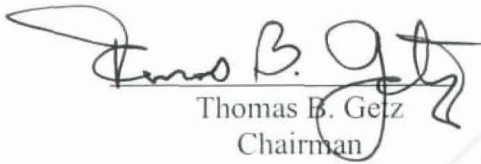
The pertinent inquiry into the reasonableness of the Regulatory Settlement centers on the promises FairPoint made in 2008 regarding capital investment, broadband build-out, quality of service, and wholesale commitments. The Regulatory Settlement reaffirms previous commitments but forgives penalties for poor retail service quality through December 31, 2009, and for not meeting broadband build-out targets for March 31, 2010. In the context of a Chapter 11 Reorganization, which provides significant legal protections to a debtor and invests the Bankruptcy Court with expansive jurisdiction, the Regulatory Settlement is reasonable inasmuch as the 2008 Settlement emerges largely intact and a Bankruptcy Court approved Plan of Reorganization makes it possible for FairPoint to meet its obligations.

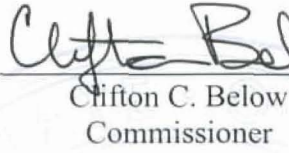
Finally, it should be noted that a fair and quick resolution of the bankruptcy proceeding is in the best interests of customers. An extended proceeding will add to the costs of administration and continue jurisdictional uncertainties in a way that benefits no one. With respect to the latter issue, FairPoint filed a letter on July 1, 2010, which makes clear the Commission's jurisdiction over the implementation of the Regulatory Settlement, thus eliminating concerns about the Bankruptcy Court's retention of jurisdiction. Accordingly, it is time to move forward. FairPoint has made steady progress in addressing its operational problems and it has significantly upgraded the talent level on its board of directors and in senior management in the most critical areas. With its substantially reduced debt burden, FairPoint needs to undertake the efforts to execute its business plan in a way that stabilizes revenues and satisfies its regulatory obligations. The Commission in turn will take the steps necessary to ensure that FairPoint makes appropriate capital investments in its infrastructure, expands broadband to meet statewide coverage targets, and achieves quality of service metrics or pays penalties that will be credited to customers' bills.

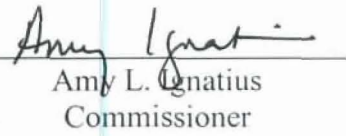
**Based upon the foregoing, it is hereby**

**ORDERED**, the requests for approval in the Petition are granted on the terms set forth in this Order.

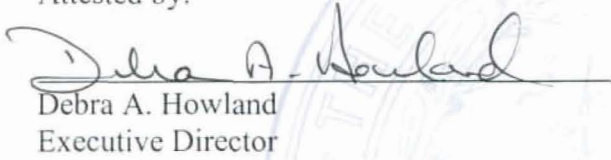
By order of the Public Utilities Commission of New Hampshire this seventh day of July, 2010.

  
Thomas B. Geiz  
Chairman

  
Clifton C. Below  
Commissioner

  
Amy L. Ignatius  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director

