

STATE OF NEW HAMPSHIRE**Inter-Department Communication****DATE:** January 6, 2014**AT (OFFICE):** NHPUC

KMB
FROM: Kate Bailey, Director Telecommunications and Dave Wiesner, Staff Attorney

SUBJECT: DT 11-061 Petition for Approval of Simplified Metrics Plan and Wholesale Performance Plan

TO: Commission
Debra Howland, Executive Director

Executive Summary

Staff recommends Commission approval of the Wholesale Performance Plan (WPP) filed by FairPoint and certain CLECs¹ on October 11, 2013 together with a Joint Motion for Approval of Stipulation and Settlement Agreement, subject to Commission resolution of the three remaining issues identified by the parties in their joint filing. With respect to these three issues, Staff recommends 1) a \$250 per day penalty for late reports provided at least \$750 per day is at risk among all three states; 2) the Commission adopt the CLEC proposal for penalties on inaccurate reports, but provide an incentive for FairPoint to find and correct inaccuracies within 30 days without penalty and provide for future bill credit reductions if the discovered inaccuracy is to the benefit of FairPoint; 3) proposed revisions to the WPP based on changes in law be reviewed and approved by the Commission, but be retroactive to the effective date of the change in law; and 4) to the extent CLECs and FairPoint agree in commercial contracts or elsewhere to waive bill credits, FairPoint pay a commensurate penalty to the state Telecommunications Planning and Development Fund. If the WPP is approved, the remaining issues in Docket Nos. DT 09-059 and DT 09-113, which have been consolidated into DT 11-061, also will be resolved.

Summary of WPP

The following is intended to summarize the proposed wholesale performance plan agreed to by certain CLECs and FairPoint. Settlement negotiations were open to all CLECs. The summary is intended to provide an overall summary, including some detail, but is not intended to cover every detail of the plan.

The new performance assurance plan measures FairPoint's performance in providing federally mandated wholesale services and is referred to as the wholesale performance plan or WPP. The plan puts \$12 million per year at risk as incentive for FairPoint to provide the agreed upon levels of service. \$4.75 million per year is at risk in both New Hampshire and Maine, and

¹ CLECs who participated in development of the WPP include: CTC, Lightship, Conversent and Choice One (all d/b/a Earthlink); BayRing; Comcast; Great Works Internet; OTT and Sovernet.

\$2.5 million is at risk in Vermont. Some metrics, or measurements, are compared to FairPoint's retail service performance to ensure parity and other metrics are compared to benchmarks, or specified performance expectations. Seventy-seven metrics are measured against benchmarks, and 55 are compared to FairPoint's retail performance. Each of these metrics is scored as met or missed each month both at the aggregate level from service to all CLECs in a state, and at the individual CLEC level. When the metric is scored as a miss, FairPoint issues bill credits for those transactions. Eighty-five additional metrics are reported for tracking and diagnostic purposes.

"Metrics" is a term of art used to refer to the measurements of the quality or timeliness of FairPoint's performance of individual tasks undertaken to enable interconnection with other carriers. The achieved results are compared to numerical standards agreed upon by FairPoint and the CLECs for performance of such tasks. Metrics are thus measures of FairPoint's performance in specific interactions with CLECs.

Determining Performance; Parity and Benchmarks

Some metrics compare FairPoint's wholesale service to FairPoint's service to its retail customers. For these metrics, FairPoint is expected to provide similar levels of service to wholesale and retail customers to ensure "parity." For parity metrics, FairPoint's wholesale and retail performance are compared and a statistical evaluation determines whether parity exists. The statistical analysis results in a score which establishes whether the standard has been met or missed. When the number of occurrences is small and the sample size of wholesale occurrences is not comparable to the sample for retail occurrences; or if there are less than 6 occurrences in either the wholesale or retail data, the statistical evaluation is not meaningful and the report will indicate "SS" for small sample rather than a "met" or "miss."

Benchmark metrics are compared to specified performance expectations, often as a percent. For example, local service requests which flow through the FairPoint systems and are rejected, are expected to be rejected within 2 hours, 95% of the time. The benchmark is 95% of rejected orders rejected within 2 hours. Performance for benchmark metrics is scored as met or miss by comparison to the agreed upon benchmark. When the sample of wholesale occurrences for a benchmark metric is so small that FairPoint's performance would have to be perfect to avoid paying a penalty, the report will indicate "SS" for small sample. This may occur, for example, if only one order were rejected in a particular month and it took the system 3 hours to reject it. The plan delineates the number of occurrences which constitute a small sample for each relevant metric. When a small sample is detected, at least two occurrences must miss the standard for the report to reflect a miss and generate a penalty.

Bill Credits/Penalties

Penalties, in the form of bill credits, are paid to CLECs when FairPoint fails to achieve a specified level of performance. These bill credits are intended to maintain an incentive for FairPoint to meet that performance level. Bill credits are based on specific performance to each CLEC. A CLEC-aggregate report provides a state summary of aggregate performance results and bill credits by metric. Each metric is scored as either met or miss, in the aggregate, by state and then individually, on separate reports for each CLEC.

The plan includes potential bill credits for some important events like system availability, new software validation or billing completeness in 12 cycles. These metrics are referred to as “per measure” metrics. The amount of money credited depends on the severity of FairPoint’s non-performance. The penalties range from \$15,000 to \$45,000, for each event. The penalty is allocated among and credited to impacted CLECs, across Maine, New Hampshire and Vermont, based on lines in service and orders provisioned in the current month for each CLEC.

Other potential bill credits are applied on a per metric basis. These metrics are referred to as “per unit” metrics and have a specified dollar amount per transaction credited for each “eligible” transaction where performance is missed. If the CLEC aggregate is a miss, CLECs who received performance worse than the standard get bill credits and the small sample rules do not apply. If the CLEC aggregate is met, no bill credits are issued. In the event performance for an individual CLEC is substandard for two consecutive months, but the CLEC aggregate performance has met the standard, the individual CLEC may request FairPoint conduct a detailed review of its performance to that CLEC.

The plan provides for an escalation of penalties for repeated failure to meet the expected standards. For pre-ordering, ordering and network performance, bill credits are doubled in the third month of missed performance, and increased by 50% of the base credit in each of the next 6 consecutive months until the 10th consecutive month of missed performance, where the bill credit is capped at 5 times the base credit until performance meets the standard. Penalties escalate more rapidly for provisioning, maintenance and repair (with one exception) and billing accuracy. As above, bill credits are doubled in the third consecutive month of missed performance, but increase by 100% of the base credit for the next 3 months until the penalty is capped at 5 times the base credit in the 6th consecutive month of missed performance, where it remains until performance is met. When performance is missed in 3 of 6 non-consecutive months, the applicable bill credit is multiplied by 2.5 for the third non-consecutive month.

Other Provisions

Within 28 days of the end of the month, FairPoint will produce its performance report and calculate credits owed to each CLEC. Bill credits, if applicable, are issued within 30 days of the report. Bill credits issued to a CLEC under terms of an interconnection agreement will reduce penalties owed as a result of the WPP; presumably to prevent FairPoint from paying a penalty twice for the same missed metric.

FairPoint or a CLEC may petition the Commission to modify the reported results to remove a single problem or event that produced multiple instances of performance below the expected standard. The petitioner must make such a request within 21 days of the date of the report, and is required to carefully document the event as well as the affected data.

Modifications can be proposed for the WPP every two years. Modifications are subject to commission approval. Administrative changes to the WPP are permitted outside the two-year review with notice to the CLECs who have an opportunity to petition the commission for review of a FairPoint proposed change or a CLEC proposed change rejected by FairPoint.

FairPoint will keep all data required for an audit for 36 months. The WPP is subject to an independent audit no more frequently than every two years, at the commission's discretion. FairPoint will pay for such audit. Results of an audit will be shared with CLECs and the other two states and modifications and/or corrections will be applied across all three states.

The WPP will remain in effect until the Commission issues a final order determining otherwise.

Settlement of Related Dockets

DT 09-113

In DT 09-113, FairPoint asked the Commission to reduce the dollars at risk for the PAP. The initial request, filed June 10, 2009, requested a waiver from PAP payments for February through June of 2009. On August 7, 2009, FairPoint supplemented its petition and requested instead to have the annual dollars at risk reduced to 39% of Verizon's 2005 net return for Maine, New Hampshire and Vermont, allocating \$14.7 million to NH (from \$42.8 million initially at risk in NH, based on 39% of Verizon's net return in 2000). The docket was stayed during the bankruptcy proceedings. In March 2011, FairPoint requested its petition be amended to cap the total dollars at risk to 39% of the 5 year rolling average of net return for the three states, recalculated annually, and that the cap be applied beginning March 31, 2011. On May 6, 2011, in Order No. 25,221, the commission determined it would audit the PAP, stayed the docket on dollars at risk, pending completion of the audit, and consolidated it into DT 11-061. The settlement agreement proposes that FairPoint will withdraw this docket with prejudice, forgoing its request to adjust the dollars at risk retroactively to March 31, 2011. Because the parties have agreed on dollars at risk in the WPP going forward, issues consolidated in this proceeding from DT 09-113 are resolved.

DT 09-059

On March 26, 2009, FairPoint requested a permanent waiver from the requirement to report and possibly pay penalties on 60 metrics that FairPoint's new systems did not measure or record for various reasons. It also requested a temporary waiver from an additional 11 metrics because the new systems failed to collect appropriate or usable data during cutover. BayRing objected to FairPoint's request on the general principle that FairPoint had agreed to recreate and report the Verizon PAP as it existed and FairPoint's failure violated the stipulation with CLECs. The docket was put on hold during the FairPoint bankruptcy, stayed pending the outcome of the PAP audit, and then consolidated with DT 11-061. The settlement agreement proposes that, if the WPP is approved, the CLECs will withdraw opposition to the requests for waivers in all three states. Staff believes the temporary waiver associated with the 11 metrics for which data was not collected during cutover is moot as a result of FairPoint's bankruptcy proceeding. Because the parties have agreed on metrics to be reported in the WPP, if the CLEC opposition is withdrawn, the remaining issues consolidated in this proceeding from DT 09-059 are resolved.

Standard of Review and Recommendation

Order No. 25,221, dated May 6, 2011 in this proceeding, recounted each of the goals described by the FCC necessary for an appropriate performance plan:

In the FCC order approving the first PAP for Verizon's interLATA entry in New York, the FCC accepted the PAP as a "benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service," *In re Verizon New England, Inc.*, 17 F.C.C. Rcd. 18660, 438 (2002). The FCC stated that a PAP has the following important characteristics:

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
- Reasonable assurances that the reported data is accurate.

Staff recommends that the Commission approve the proposed WPP filed jointly by FairPoint and the CLECs, subject to resolution of the three remaining issues in dispute. The proposed WPP appears to strike a reasonable and appropriate balance between the interests of FairPoint and competitive carriers and contains more specific metrics and billing credit penalty provisions than the existing PAP. The WPP is self-executing, simplified and more transparent than the existing PAP. The potential liability, agreed to by FairPoint and CLECs, should provide a meaningful and significant incentive to comply with the standards as long as it remains potentially \$4.75 million per year in New Hampshire. The measures and standards are clearly articulated, and agreement among the parties indicates a structure designed to detect and sanction poor performance. With Commission resolution of the disputes on late and inaccurate reporting, change in law provisions, and waiver of potential liability through commercial contracts, the WPP will contain all the characteristics necessary for an appropriate performance plan.

Unresolved Issues

There are three issues on which the parties could not reach agreement. These issues include 1) the terms and penalties for late or inaccurate monthly reports, 2) the effect of changes in law on WPP provisions, and 3) commercial contract provisions signed by CLECs that waive WPP bill credits. Resolution of each of these issues is necessary to ensure the WPP meets all of the FCC characteristics listed above.

1. Terms and Penalties for Late or Inaccurate Monthly Reports

In its brief, filed November 8, 2013, FairPoint argued there is no need for penalties for late or inaccurate reports, because the only existing PAP which requires such a penalty is in Maine, and the penalty has never been employed. If the Commission finds such a penalty is necessary, FairPoint proposes to base the penalty on the existing Maine PAP, but reduce the overall cap on the penalties from \$120,000 in Maine alone to \$60,000 per state (totaling a \$180,000 cap for the three states). For late reports, FairPoint proposes to decrease the amount from \$500 per day under the Maine PAP to \$250 per day, but would pay this lower amount in each state, effectively raising the penalty to \$750 per day.

FairPoint also proposes to reduce the penalty for inaccurate reports from \$1,000 under the Maine PAP to \$250 per day per inaccurate report in each of the three states. Because the reports are generated from the same source, FairPoint argues, this effectively sets the penalty for inaccurate reports at \$750 per day. FairPoint proposes that these penalties be paid into a state fund rather than to CLECs. FairPoint argues that its proposal increases its exposure from \$500 to \$750 per day for late reports, and appropriately decreases its exposure from \$1,000 to \$750 per day for inaccurate reports.

Pursuant to FairPoint's proposal, CLECs would be required to notify FairPoint within three days if FairPoint posts its report late, and CLECs would have the burden of showing reports were inaccurate based on objective information available to both parties. FairPoint also proposes a "materiality threshold," which is not explained in the brief, and "in the absence of sufficient materiality data," a daily penalty of \$500 per day per state until the reporting error is corrected. Finally, FairPoint recommends including a dispute resolution process for late or inaccurate reporting.

The CLECs, in their initial brief dated November 8, 2013, proposed alternative penalties and procedures for late or inaccurate reports under the WPP. The CLECs proposed that FairPoint issue bill credits in the amount of \$500 per day per state for each day that WPP data or reports are late, and that these bill credits be allocated among all eligible CLECs.

With respect to inaccurate reports, the CLECs proposed that FairPoint have the ongoing responsibility to identify and correct any inaccuracies in its monthly WPP reports, while both FairPoint and CLECs would have to notify one another of inaccuracies within 30 days of discovery. If FairPoint and CLECs agree that a WPP report contains an error, the CLECs propose that FairPoint would calculate the effect of such error on an aggregate and CLEC-specific basis; if the discovered error is material (defined as \$500 or more for an individual CLEC or \$2,500 on an aggregate CLEC basis), then FairPoint would be required to correct and reissue all affected WPP reports and data and to post corrective credits for prior periods of 12-24 months, depending on the size of the bill credit impact resulting from the error. Non-material errors would be corrected on a prospective basis beginning 30 days from confirmation of the error.

Under the CLECs' proposal, FairPoint would be required to post corrective bill credits for all affected CLECs within 30 days of reissuance of the previously erroneous WPP report; in

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

If FairPoint and a CLEC cannot agree on whether a WPP report is incomplete or erroneous, or if they cannot agree on whether an inaccuracy is material, either party may file a petition asking the Commission to resolve the dispute, under the CLECs' proposal. If the Commission determines that the WPP report was incomplete or erroneous, then FairPoint would be required to reissue the report, issue corrective bill credits, and post the additional bill credits for payments and interest in the same manner described above.

The CLECs proposed that any CLEC have the right to initiate an independent third-party audit or review, with approval of the Commission or authorized staff, of FairPoint's data collection, computing, and/or reporting process issues. This audit would be conducted at the CLEC's expense, provided that, if the audit or review affirms the issue initially presented by the CLEC and denied by FairPoint as one that materially affects reported performance results, then FairPoint would be required to reimburse the CLEC for the costs of the audit or review.

In its reply brief dated December 3, 2013, FairPoint restated its view that penalties for late or inaccurate WPP reports were unnecessary, but if deemed to be required they should be based on the existing Maine PAP extended to cover all three states. FairPoint criticized the CLECs' proposal as effectively representing (1) an unjustified self-enrichment arrangement designed to provide bonus compensation to the CLECs, (2) an abdication of the CLECs' duties of diligent review and timely notification, and (3) a post-settlement expansion of audit provisions and performance penalties. FairPoint also pointed out that the CLECs' proposal is not reciprocal, given that no provision is made for refunds or bill credit reductions if a discovered inaccuracy is to its benefit rather than the CLECs' benefit.

In their reply brief dated December 3, 2013, the CLECs maintained that FairPoint's proposal for late and inaccurate WPP reports fails to account for its history of poor performance and inaccurate reporting since the Verizon cutover. In addition, according to the CLECs, FairPoint's proposed provisions for late and inaccurate reporting would not provide sufficient incentives for it to accurately report WPP results. If performance reports are inaccurate and bill credits are avoided, then the WPP safeguards against poor performance and discriminatory treatment could be rendered meaningless and ineffective, in the CLECs' view. The CLECs defended their proposed provisions for late and inaccurate reporting as balancing the needs of all parties: FairPoint would be held accountable for bill credits for poor performance and penalized for inaccurate reporting, while its liability would be limited to reasonable periods of time.

The CLECs argued in particular that FairPoint should be required to re-issue corrected reports and WPP bill credits, late reporting penalties should not be limited as FairPoint proposed, penalties for inaccurate reporting should reflect the size and scope of FairPoint's errors, late and inaccurate reporting penalties should not be subject to a separate cap, and any penalties should be paid to the impacted CLECs.

Comcast Phone of New Hampshire, LLC (Comcast) also filed a reply brief on December 3, 2013, indicating its full support for Commission adoption and incorporation into the WPP of the CLECs' proposed terms that "promote the timely and accurate collection and reporting of performance results and posting of bill credits."

Recommendation on Terms and Penalties for Late or Inaccurate Monthly Reports

Staff recommends the Commission adopt FairPoint's proposal to pay \$250 per day, in each state, or \$750 per day in total, for late filed reports. In the event Maine or Vermont does not require a penalty of at least \$250 per day, Staff recommends this penalty be increased in New Hampshire so that the total dollars at risk to FairPoint from the three states is not less than \$750 per day for late filed reports. Allocation of the bill credits for late filed reports should follow that for per measure metrics, by state. Staff recommends the Commission adopt the CLECs' proposal for inaccurate reporting penalties in order to assure the reported data is accurate. However, to provide an incentive for FairPoint to monitor and correct inaccuracies in a timely manner, Staff recommends that the proposed penalties be waived if FairPoint identifies and corrects an inaccuracy within 30 days of issuance of the first report in which an inaccuracy appears. Staff further recommends that the bill credit provisions be rendered reciprocal, so that any discovered inaccuracy to FairPoint's benefit would result in a reduction of future bill credits to the CLECs.

2. Change In Law Provisions

In its initial brief, FairPoint argued that the WPP should be self-executing and that if FairPoint is no longer required to provide a particular service or network element as a result of a change in law, then that service or element should no longer be subject to the metrics, reporting or bill credit provisions of the WPP. FairPoint proposed that the WPP contain a change in law section including the following as its second paragraph:

Notwithstanding anything in the preceding paragraph to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in applicable law, FairPoint is not required by applicable law to provide any service/product reported in the WPP, then FairPoint will no longer be subject to any metrics or bill credits associated with that service/product.

In support of this language, FairPoint emphasized that the purpose of the WPP is to ensure that FairPoint will provide services, access and interconnection in accordance with legal requirements, and if neither the law nor any agreement requires FairPoint to provide a particular service, access or interconnection, then the WPP should be considered immediately moot with respect to that requirement and should be modified accordingly, without the need for any further process or approval.

The CLECs in their initial brief criticized FairPoint's proposed language as reserving to itself the unilateral right to modify WPP provisions without regulatory review or approval upon a purported change in applicable law. The CLECs instead proposed that the WPP change in law

section include a defined role for the Commission, either to approve agreed-upon revisions or to resolve any differences, based on the following second paragraph language:

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

The CLECs maintained that this procedure would be consistent with the process that resulted in the WPP itself, which has now been agreed-upon and submitted jointly to the Commission for review and approval. If the parties agree to any future WPP revisions based on a change in law, then these revisions would be submitted for regulatory review and approval, under the CLECs' proposal; in the absence of such agreement, a party would have the right to submit the matter to the Commission for resolution.

In its reply brief, FairPoint maintained that its proposed "streamlined" process, criticized by the CLECs as "unilateral," would be limited to the discontinuance of products and services (such as unbundled network elements) that are delisted following "extensive due process at the federal level." FairPoint asserted that there is no reason to introduce any more process at the state level regarding any such delisted products and services, as proposed by the CLECs, "except to perpetuate the income stream that the WPP represents (especially under the CLEC proposal)."

In their reply brief, the CLECs reiterated their view that FairPoint's proposed language would improperly permit it to unilaterally modify the WPP terms, and is thus inconsistent with both the stipulated WPP terms and the Commission's ongoing role in ensuring competition in the local telecommunications market. The CLECs further claimed that the proposed FairPoint change in law language is inconsistent with the terms of the New York PAP, which served as the model for the current PAP. The CLECs maintained that their proposed change in law section language, unlike FairPoint's, provides for a fair and orderly process to account for any changes in applicable law that substantively affect material provisions of the WPP, whether legislative, regulatory, judicial or other governmental decision, order, determination or action.

Comcast's reply brief expressed full support for Commission adoption and incorporation into the WPP of the CLECs' proposed terms that "appropriately account for any changes in law and establish an orderly process for their implementation, with proper Commission oversight."

Recommendation on Change in Law Provisions

Staff agrees with the CLECs that any revision of the WPP terms and conditions based on a change in law should be implemented only after review and approval by the Commission. It is rare that an FCC order or change in law is undisputable. Allowing FairPoint to prohibit opportunity for debate about such a change in law may have an adverse effect on the clearly-articulated, pre-determined measures and standards agreed upon between opposing parties. Staff acknowledges, however, that FairPoint raises a valid point that certain legal or regulatory changes may be beyond reasonable contention, such that their immediate implementation would be appropriate. FairPoint's concern may be addressed by permitting revisions to WPP

performance metrics and related billing credits to be retroactive to the effective date of the change in law once the revisions have been reviewed and approved by the Commission. This approach would preserve the Commission's oversight of changes to the WPP, while financially effecting any service or product delisting as of the change in law and diminishing any incentive to unnecessarily delay the state regulatory approval process.

3. Commercial Contract Bill Credit Waivers

FairPoint has entered into "commercial contracts" with certain CLECs that it claims waive billing credits under the PAP and the WPP as successor to the PAP. FairPoint maintained in its initial brief that these contracts cover services that are not within the jurisdiction of the Commission and contain terms and conditions, including the billing credit waivers that were freely bargained for by competitive carriers. In FairPoint's view, the Commission lacks authority to interpret or enforce commercial contracts, so the issue of commercial contract provisions that waive WPP credits is irrelevant to this proceeding and should not be considered by the Commission.

In their initial brief, the CLECs asked the Commission to determine that the WPP is not subject to waiver by any party, and that all eligible CLECs should be included in the new WPP bill credit provisions in order to maintain effectiveness of the WPP in ensuring an open and competitive telecommunications market. The CLECs asserted that, if the WPP allows FairPoint to obtain or enforce contractual waivers from individual CLECs of WPP bill credit penalties, such that these penalties are not paid out to CLECs, then the pro-competitive incentive structure of the WPP would break down for all CLECs to the detriment of the overall competitive marketplace. The CLECs claimed that approximately half of the PAP credits that should be paid each month are never actually paid by FairPoint due to waivers imposed by FairPoint under its wholesale agreements. In the CLECs' view, the financial incentives intentionally built into the original PAP to deter "backsliding" in the provision of wholesale services are being severely weakened as a result of these waivers, and all carriers are potentially harmed by the weakening of these incentives.

In its reply brief, FairPoint reiterated the position that its commercial contracts are beyond the scope of the Commission's jurisdiction and should not be considered in this docket. FairPoint also pointed out what it claims are flaws in the CLECs' arguments regarding the scope of the potential harm to individual CLECs and the competitive market as a whole. In particular, FairPoint asserted that its "Wholesale Advantage Agreements" would not be relevant because the services provided under these agreements are not the subject of metrics or credits under the new WPP. FairPoint further maintained that its overall exposure would not be reduced by the reversion of bill credits because they would not be counted against the cap on dollars at risk, and that individual CLECs might actually see their individual credits increase if another CLEC waives the WPP bill credits, at least with respect to those credits that are issued on a "per measure" basis.

In their reply brief, the CLECs asserted that FairPoint's requirement that CLECs waive performance standards and penalties which are required by orders of state and federal regulatory agencies fundamentally undermines both the purpose and execution of the WPP. The CLECs

maintained that approval of the proposed WPP without having addressed the commercial contract waiver issue would “leave the door open for FairPoint to once again, as it has in the past, avoid the payment of properly imposed penalties and, more importantly, allow FairPoint to provide poor, discriminatory service to CLECs thereby undermining the balance of the competitive market.” The CLECs criticized FairPoint’s argument that state commissions do not have jurisdiction over contractual waivers of WPP penalties, stating that “the proper functioning of the WPP is most certainly within this Commission's jurisdiction.” They further asserted that the already reduced penalties under the new WPP would be “rendered meaningless and ineffective if FairPoint is allowed to impose and enforce waiver provisions.” Accordingly, the CLECs asked the Commission to reject FairPoint's arguments and include language in the WPP prohibiting enforcement of any waivers of billing credit penalties, both past and future, under the existing PAP and the new WPP.

Recommendation on Commercial Contract Bill Credit Waivers

Staff takes no position on whether the Commission has jurisdiction over commercial contracts. However, the first characteristic articulated by the FCC necessary for a performance assurance plan is “potential liability that provides a meaningful and significant incentive to comply with the designated performance standards.” Commercial contracts may waive penalties for services not required by sections 251 or 271, but should not be allowed to affect potential liability under the WPP designed to provide incentives for FairPoint to comply with the specified performance standards. Accordingly, without taking a position on the Commission’s jurisdiction over commercial contracts, Staff recommends that the Commission require any WPP bill credits waived by a CLEC through a commercial contract, or otherwise, be paid to the telecommunications planning and development fund established by RSA 12-A:45-a. In the event a CLEC chooses to waive its right to receive potential bill credits or penalties under the WPP for other considerations, it may do so, but all of the \$4.75 million liability in New Hampshire, agreed to by FairPoint and the CLECs must remain at risk, or the potential liability under the WPP will be neither meaningful nor significant.