

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

FAIRPOINT COMMUNICATIONS, INC.

Docket No. _____

**Office of Consumer Advocate's Petition to Establish
a New Adjudicative Docket to Investigate FairPoint Communications, Inc.**

The Office of Consumer Advocate (the "OCA") respectfully requests that the Commission immediately open a new adjudicative docket in order to evaluate and implement all necessary steps to ensure that FairPoint Communications, Inc. ("FairPoint") is able to normalize operations as soon as possible and is in compliance with all Commission Orders, and designate certain parties as staff advocates. As described further below, the OCA recommends that this adjudicative proceeding be administered in multiple phases, each including the opportunity for a hearing before the Commission,¹ and that certain entities, in addition to FairPoint, be made mandatory parties. The OCA also asks that the Commission retain a new independent third party to assist the OCA, and other non-settling parties, in this new adjudicatory proceeding. In support of its requests for relief, the OCA states the following facts and law.

1. On February 25, 2008, the New Hampshire Public Utilities Commission (Commission) approved the transfer of the local exchange and long distance businesses in New Hampshire owned by subsidiaries of Verizon Communications, Inc. (Verizon) to entities controlled by FairPoint in Docket DT 07-011. *See* Order No. 24, 823 ("Final Order").
2. The Final Order approved a settlement agreement filed by Verizon, FairPoint and Commission Staff, which recommended approval of the transfer with certain conditions

¹ This is the OCA's second written request for an adjudicatory process to consider many of these issues. On March 6, 2009, the OCA requested that the Commission hold a hearing related to FairPoint's financial status as well as whether the company was in compliance with the terms of the Final Order.

(“Settlement Agreement”). *See* Final Order at p. 89. The Final Order also approved settlement agreements between FairPoint and other parties, including certain competitive local exchange carriers (“CLECs”).

3. Liberty Consulting advised the Commission Staff and served as Staff’s expert witnesses during the merger proceedings.² As part of the approval of the transaction, the Commission required that Liberty continue to monitor FairPoint’s readiness for Cutover, and perform other ongoing monitoring. Liberty also testified to the Commission that FairPoint was ready for cutover.³ It is the OCA’s understanding that Liberty continues to monitor FairPoint, and it has provided reports on FairPoint’s performance as recently as this week.⁴
4. In pertinent part, the Settlement Agreement, as approved by the Final Order, contained terms obliging FairPoint to provide a certain level of service to its customers. *See* Settlement Agreement, January 24, 2008, Section 10, paragraph 9.3 and Exhibit 3.
5. In the Final Order, the Commission found that:

FairPoint has made commitments that are calculated to promote the financial health of its regulated operations in New Hampshire. It has also made binding promises about service quality, relations with wholesale competitors, cooperation with other users of utility poles, and broadband buildout

² Liberty served as the expert witnesses to Commission Staff during the proceeding, and, in that role, helped to negotiate the Settlement Agreement between Staff, FairPoint and Verizon, which recommended that the Commission approve the transaction with certain conditions. It then testified at the final hearings in DT 07-011 to advocate on behalf of Staff that the Commission approve the settlement.

³ In its role as “independent third party monitor,” Liberty was charged with carefully reviewing and monitoring whether FairPoint was ready for cutover. After this review, Liberty opined that FairPoint was ready for cutover, *see* Monthly Reports and Cutover Readiness Reports provided by Liberty Consulting at <http://www.puc.nh.gov/Telecom/FairPoint.htm>, a conclusion that a Liberty witness repeated under oath at the Commission hearing on readiness for cutover on November 25, 2009. *See, e.g.* Transcript of CutOver Hearing, November 25, 2008 at p. 152 In making its own recommendation that the Commission allow cutover to proceed, Staff relied upon Liberty. *See* Transcript at p. 229. (“We urge you to accept the well informed, objectively executed, patiently developed, and impartially expressed conclusions and recommendations of Liberty, and that you seek from FairPoint the assurances that Liberty has offered”).

⁴ Liberty continued in its monitoring role after cutover, as required by the Commission’s December 9, 2009 Secretarial Letter. Based upon information and belief, Liberty continues to function in this role, reporting to the three State Commissions and their Staffs.

FairPoint has thus committed itself to performance as a utility that is superior to that of its predecessor. FairPoint has also demonstrated that it has the financial, managerial and technical capacity to fulfill its commitments

Final Order at pp. 87 and 88 (emphasis added).⁵

6. At midnight on January 30, 2009, FairPoint began a cutover from the Verizon systems to new systems and processes developed in large part by its consultant, Capgemini (“Cutover”). After completion of the Cutover process, FairPoint started fully operating on the new systems on February 9, 2009.
7. Since Cutover, both retail and wholesale customers have experienced, and continue to experience, a number of significant problems with FairPoint’s service.
8. Contrary to the Commission’s expectations, FairPoint is not performing “superior to that of its predecessor” Verizon, which itself had a history of poor customer service. Instead, FairPoint is failing to meet even the most basic standards required of a public utility.
9. The OCA believes that FairPoint is also not in compliance with many requirements of the settlement agreements and the Final Order that approved them. *See e.g.* FairPoint’s PAP Waiver requests in DT 09-59 and DT 09-113; the attached PUC’s Consumer Affairs Division reports for the months of April – June 2009; and FairPoint’s own daily and weekly reports, as well as its Stabilization Plan Status Report of July 8, 2009.

⁵ The Commission did qualify these findings, and its approval of the transaction, with the following:

The French philosopher Voltaire (1694-1778) famously observed that *le mieux est l’ennemi du bien*. This is usually translated as “the perfect is the enemy of the good.” It is an aphorism particularly well-suited to this proceeding. Arguably, a perfect result here would, among other things, include the promise of reliable and inexpensive landline telephone service regardless of what technologies may be developed in the future, a FairPoint with the resources and business plan to thrive in any conceivable set of circumstances, and an unqualified guarantee of a good living and prosperous retirement for the employees who provide the service. But implicit in the notion of deciding whether the transaction is “for the public good” is that we should not demand unattainable perfection and that we can act only within the bounds of the jurisdiction delegated to us. We therefore approve today a good proposal, one that we conclude leaves New Hampshire better positioned than previously to attain its best possible future.

10. FairPoint's continued poor operational performance since cutover suggests that it simply does not possess the requisite financial, technical or managerial capabilities required to operate New Hampshire's vital telecommunications network. FairPoint's substandard performance and possible violations of the Commission's Final Order approving the transfer from Verizon warrant immediate action by the Commission.
11. At the same time, to say that FairPoint is struggling financially is an understatement. Among other things, on June 24, 2009, FairPoint filed an 8K with the Securities and Exchange Commission ("SEC") announcing that it had commenced a private exchange offer ("Exchange Offer") for all of FairPoint's outstanding 13 1/8% Senior Notes due 2018. *See* FairPoint Press Release dated June 24, 2009.⁶
12. In a press release issued that same day, FairPoint explained the Exchange Offer:
- The Exchange Offer is primarily designed to reduce FairPoint's cash interest expense for the second and third quarters of 2009 and to help FairPoint maintain compliance with the interest coverage ratio maintenance covenant contained in its senior secured credit facility (the "Credit Facility") for the measurement period ending June 30, 2009.
- FairPoint Press Release, June 24, 2009.
13. On July 8 and July 13, 2009, FairPoint amended its Exchange Offer, extending several deadlines for participating, and increasing the compensation offered to participating bondholders. FairPoint Press Release dated July 8, 2009⁷, and FairPoint's Press Release dated July 13, 2009.⁸

⁶ Available at http://www.fairpoint.com/Images/06%2024%2009%20-%20FairPoint-Debt%20Exchange%20Offer%20Press%20Release-FINAL_tcm52-7459.pdf.

⁷ Available at http://www.fairpoint.com/Images/07%2008%2009%20-%20FairPoint-Exchange%20Offer%20Extension-FINAL_tcm52-7484.pdf.

⁸ Available at http://www.fairpoint.com/Images/07%2013%2009%20-%20FairPoint%20-%20Exchange%20Offer%20Amendment%20Press%20Release-FINAL_tcm52-7487.pdf.

14. In order to consummate the Exchange Offer, FairPoint requires 95% participation by the holders of its 131/8% Senior Notes due in 2018. In its July 13, 2009 Press Release, FairPoint disclosed that only 7.5% of the Notes had been tendered at that time.
15. FairPoint's financial viability appears to rest heavily on the Exchange Offer. FairPoint has stated, "If the Company is unable to consummate the Exchange Offer and Consent Solicitation it may need to seek alternative restructuring plans that may include a waiver under the Credit Facility, which would likely be on terms less favorable to the Company, or a bankruptcy proceeding, which, in each case, could negatively impact or completely eliminate the Company's ability to meet its cash interest payment obligations to holders of Notes." *See* June 24, 2009 8-K at p. 5 (emphasis added).
16. Even if the Exchange Offer is consummated, FairPoint has stated that it still faces significant financial hurdles. FairPoint "currently expects that the Exchange Offer may not provide a sufficient reduction in the Company's interest expense to prevent a breach of the interest coverage ratio maintenance covenant for the measurement period ending September 30, 2009 In addition, the Company currently expects that it may be in breach of the leverage ratio maintenance covenant in the Credit Facility as early as the measurement period ending September 30, 2009." June 24, 2009 8-K at p. 5.
17. Clearly, FairPoint's financial health is very dependent upon its ability to stabilize its operations and service to customers. *See, e.g.*, June 24, 2009 8-K at p. 3. ("Because of Cutover issues that have prevented the Company from executing fully on its operating plan for 2009, the Company's revenue has continued to decline."). Consequently, FairPoint's financial status should be considered within the context of a much broader inquiry into FairPoint's operational health and stability.

18. FairPoint's responses to the concerns of the Commission and others included the filing of an original and updated Stabilization Plans. *See* FairPoint Stabilization Plan dated March 24, 2009; FairPoint Stabilization Plan dated March 31, 2009; and FairPoint Stabilization Plan Update and Milestones dated April 17, 2009. FairPoint has also been providing daily service quality reports and weekly "Milestone Reports" to update the Commission on the Company's progress meeting certain "milestones designed to measure FairPoint's progress to achieve Business As Usual prior to the end of the second quarter." FairPoint Stabilization Plan Update and Milestones April 17, 2009, p. 6.
19. On July 8, 2009 FairPoint provided a "Stabilization Plan Status Report" to Staff and the OCA. Though FairPoint acknowledges that "more needs to be done" to address systems problems, the Company states that the results "clearly show significant improvement for all the operating areas of the business since March." Status Report at p. 7 (pages not numbered).
20. On July 14, 2009, Staff filed several documents, including one titled "Assessment of FairPoint's Stabilization Plan Status Report" prepared by Liberty Consulting, dated July 13, 2009 ("Liberty July 13 Report").
21. In its July 13, 2009 Report, Liberty states that it "cannot verify the accuracy of [FairPoint's] reported data in most cases." Liberty July 13 Report at p. 2 (emphasis added). The Report states that "Liberty questions to what extent FairPoint has accurately represented the status of addressing customer escalations," and includes other alarming statements concerning the veracity of the reports as well as FairPoint's ability to understand and address the issues at hand.

22. Perhaps even more disturbing is Liberty's statement that it "is surprised that so many issues with the stability and functioning of FairPoint's systems continue to appear more than five months after cutover." Liberty July 13, 2009 Report, at p. 9. Remarkably, Liberty continues, "Until these are resolved, it is uncertain when FairPoint will be able to fully return to normal operations." Liberty July 13 Report at p. 2 (emphasis added).
23. These statements are a very clear indication of the need for immediate Commission intervention: The "independent third party monitor" that is charged with overseeing FairPoint's progress and reporting back to the Commission is "surprised" at the current state of affairs, and based on current information is not able to predict when operations might return to a normal state. This lack of awareness of Liberty is simply unacceptable, and calls for immediate Commission action to bring in a truly "independent" third-party monitor and investigator on board, one which has not been involved in the merger proceedings.
24. Liberty suggests that "The onus is on FairPoint to explain how and when it will ultimately resolve the remaining issues so it can truly state that it is providing service from a customer's perspective that equates to what they were receiving from FairPoint prior to cutover." The OCA posits that FairPoint is not the only party who needs to explain itself. We agree that FairPoint must be required to do more than it has done thus far to address the myriad problems it has faced since cutover, and, ultimately, be held accountable for its failures. However, we strongly believe that the "onus" should be shared by other parties as well – namely Liberty Consulting, Capgemini, and Verizon.
25. The Staff Memorandum included in the July 14, 2009 filing recommends a technical conference for the purpose of "work[ing] through the Stabilization Plan Status Report and

the supporting data in detail, and to determine specifically where FairPoint is in returning its operations to business as usual.”

26. The OCA agrees that such a review is necessary, but we respectfully request that this technical session occur within the context of a new adjudicatory docket.
27. Additionally, we request that the parties to a new adjudicatory docket be given an opportunity to obtain additional and more accurate information about FairPoint’s status. The Commission should require an additional assessment by a new independent monitor to be conducted and provided to the parties early in a new docket. The OCA’s request for a new independent monitor is discussed in more detail below.
28. The OCA’s position that further information is necessary before proceeding with a technical session is supported by Liberty’s Report which suggests that FairPoint’s data and reporting of its status is suspect, and the recent filings by CLECs which also suggest that FairPoint’s data is flawed.⁹ To continue to accept FairPoint’s word for where they stand is unacceptable; a rigorous and truly independent review must begin immediately.
29. The scope of the Commission’s investigation should be broad and may require multiple phases. For example, the first phase would focus on normalizing operations, and a future phase or phases could focus on root cause analysis of why the problems arose, service quality penalties, and other compliance issues related to the Final Order. The OCA recognizes that FairPoint is precariously situated at this time, and we appreciate that regulatory efforts need to be focused now on stabilizing the company. However, the OCA takes the position that during this period of time – when regulation has effectively

⁹ FairPoint is seeking waivers to the Wholesale Performance Assurance Plan (“PAP”) in two new dockets, DT 09-59 DT 09-113. In response, several Competitive Local Exchange Carriers (“CLECs”) have made filings or statements that suggest that FairPoint’s reports are inaccurate because they do not reflect the poor levels of service that wholesale customers, and their retail customers, continue to experience.

been suspended – the Company should be held accountable to the Commission, the parties, and the people of New Hampshire, as well as on notice that an investigation will take place in the near future that may include financial or other remedies.

30. The OCA requests that the Commission define the scope of the new docket to include, but not be limited to, issues such as:
- a. FairPoint’s specific problems associated with cutover and its new systems, with a focus on developing specific ways to address these problems;
 - b. FairPoint’s compliance with the Final Order and the settlement agreements that it approved;
 - c. FairPoint’s financial status and how it relates to the company’s inability to operate its systems; and
 - d. The lack of any detailed plan – or even an overall strategy – as to specifically how FairPoint will improve its retail and wholesale systems and service.¹⁰
31. The Commission not only has the legal authority to commence the requested adjudicatory proceeding to consider these issues, it has the responsibility to do so. *See, e.g.*, RSA 374:1 (requiring safe and adequate service); RSA 374:2 (requiring just and reasonable rates); RSA 374:3 (authorizing general supervision over utilities); RSA 374:4 (power and duty of the Commission to keep informed as to the operation and management of public utilities “not only with respect to the safety, adequacy and accommodation offered by their service, but also with respect to their compliance with all provisions of law, orders of the commission”); RSA 365:5 and 365:19 (authority to independently investigate rates

¹⁰ FairPoint has no concrete plan to identify problems or to address them. In addition, the company *alone* (perhaps with input from Liberty) has been determining the goals and the timelines to normalize operations, and then it simply changes or extends them. The corporate reshuffling of late and hiring of multiple consultants is also questionable in terms of effectiveness. This approach is not working and must stop.

and conduct of public utility); RSA 365:40 (requiring utility and its officers to obey Commission orders); and RSA 365:41 and :42 (authorizing the imposition of fines for violations of orders).

32. The OCA believes that the broad issues discussed above encompass not only an investigation of FairPoint's conduct, but also an investigation of the performance of the various consultants who worked on critical aspects of the merger proceeding or the merger itself. These consultants should include Liberty Consulting, who advised the Commission Staff and served as their expert witnesses during the merger proceedings, and has advised the Commission and its Staff since approval of the merger. The Commission should also investigate the performance of the consultants retained by FairPoint to develop its new systems which are not performing, including Capgemini, who the OCA understands recommended systems and had responsibility for integrating them with the intention that they are able to function together.
33. In the Final Order the Commission ordered that "upon the transfers approved above, Verizon New England and affiliates be authorized pursuant to RSA 374:28 to discontinue utility operations in New Hampshire, *subject to the ongoing jurisdiction of the Commission for purposes of enforcing the conditions described in the order herein.*" Order at p. 89 (emphasis added).
34. The Commission should determine whether it retains ongoing jurisdiction over Verizon, and if so, undertake an investigation of Verizon's conduct before, during and after the proceedings that concluded with the Final Order. Specifically, the OCA suggests that the Commission consider whether Verizon acted unlawfully by failing to disclose

information or otherwise, and whether Verizon has an affirmative obligation to assist FairPoint with its current operational problems.

35. The Commission should also include in the scope of the new docket an inquiry into whether FairPoint's new systems are fixable. The OCA requests that the Commission retain a new independent third party to conduct an analysis of FairPoint's current status and plans to fix its systems problems and restore to at least pre-cutover levels its service to customers. The OCA respectfully requests that the Commission permit the OCA to participate in the selection of the independent monitor.
36. The OCA respectfully recommends that Liberty Consulting not be vested with this role and responsibility. Liberty is not sufficiently independent to perform this function when one considers the integral role it played in advocating for the Settlement Agreement with Verizon and FairPoint, as well as its active role in overseeing and confirming FairPoint's readiness for cutover and in its oversight of FairPoint's functioning since cutover. Liberty has also failed to foresee the problems that have arisen.
37. Notwithstanding its lack of independence that is now required and the fact that it has been monitoring FairPoint since the transaction was approved, Liberty has identified a number of problems related to cutover, including problems with management and internal processes that continue to be alarming.¹¹
38. Staff is similarly situated and should therefore be designated as "advocates" in a new docket. Due to its role in developing the Settlement Agreement in DT 07-011 and its

¹¹ See "FairPoint Post-Cutover Status Report," dated April 1, 2009. These internal problems included management problems such as being "overly optimistic," and suffering from "ad hoc internal processes and communications channels and the lack of systematic approaches to addressing the problems." *Id.* at p. 10. Liberty also identified systems problems such as "significant system defects even for common retail and wholesale transactions (such as accessing customer account information and ordering simple services)." *Id.* at p. 7. Liberty concluded the report by identifying "outstanding issues" and questions related to "potential causes of the current problems."

direct involvement in monitoring activities since approval of the transaction, the OCA believes that it is appropriate for the Commission to designate certain members of the Commission's Telecommunications Division as "Staff Advocates" pursuant to RSA 363:32. Such designation "would have the effect of precluding them from advising the commissioners with respect to matters at issue in the docket while subjecting [designated Staff members] to the *ex parte* restrictions that apply routinely in adjudicative proceedings to persons outside the agency." DG 07-033 Secretarial Letter, June 1, 2007. The statute requires that "the commission shall designate members of its staff as staff advocates and decisional employees . . . when: (1) it appears that staff members are committed or likely to commit to a highly adversarial position in the proceeding and may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding. RSA 363:32(a)(1) (emphasis added). The statute provides three other criteria which we believe are also met in this case.

39. Such designation allows Staff Advocates to continue to advance the positions they have held during DT 07-011 and since, while removing Staff Advocates from the role of decisional employees who directly advise the Commission. It importantly protects the interest of other parties by ensuring that such designated Staff Advocates are limited in their contact with the Commission, and are required to provide other parties with notice of their communications with the Commission, as are other parties to a proceeding who may not have *ex parte* communications.

40. In addition, if Staff chooses to continue to engage Liberty as consultants, Liberty should not be considered advisory to the Commission.¹²
41. The OCA recognizes that the immediate focus in the new docket should be on identifying and removing all impediments to FairPoint's ability to deliver adequate service to its customers, wholesale and retail. However, recognizing that there will need to be an investigation into a number of other issues once FairPoint stabilizes itself, the Commission should require FairPoint, Verizon, Liberty, Capgemini and others as appropriate to preserve all documents and communications related to cutover, its preparation for it and its response to it. By explicitly requiring FairPoint (and other parties) to preserve this material, the Commission may penalize FairPoint to the extent that it destroys or fails to preserve documents necessary for future phases of the new docket.
42. In its Post-Cutover Report, Liberty suggests that the Commission has already recognized that such inquiries need to be conducted after FairPoint is able to normalize operations.

The Regulators and Staffs have also asked Liberty¹³ eventually to provide an analysis of why the problems have arisen, given the extensive cutover preparations and scrutiny. At this point, such an analysis is not timely; it is correct for the attention of all to focus on finding solutions to resolve the current problems. Certainly, however, solutions to persistent and pervasive problems require an understanding of root causes. Liberty has been raising questions seeking to identify those root causes while observing and analyzing the current problems.

Liberty Post-Cutover Report, April 1, 2009 at p. 2.

As a result, FairPoint should be expressly directed to take all necessary steps to preserve evidence related to cutover and the resulting systems problems.

¹² The OCA understands that Staff filed a memorandum with the Commission on July 16, 2009 recommending that Liberty be authorized to conduct a root cause analysis. The OCA respectfully suggests that while Liberty might play a role in an investigation as to what went wrong and how to address it, the firm should not be the lead investigator.

¹³ The OCA reiterates its objection to Liberty Consulting undertaking this type of review due to its involvement in the case and its failure to foresee the problems that exist today, or to help develop plans to address them.

43. The OCA has a strong interest, on behalf of residential consumers, in ensuring that FairPoint complies with the Final Order and successfully normalizes operations in New Hampshire. FairPoint's failure to comply, and its continuing failure to normalize operations, is negatively impacting FairPoint's customers, including residential customers, which the OCA represents. *See* RSA 363:28, II.

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Immediately open a new adjudicative docket for the purposes discussed above and in order to allow the Commission to conduct its monitoring of FairPoint with greater transparency;
- B. Make Verizon, Liberty, Capgemini and FairPoint mandatory parties in the docket;
- C. Retain a new independent third party to assist the OCA and other non-settling parties with the new adjudicatory docket to, among other things, ensure that FairPoint's reports are valid, with OCA participation in the selection;
- D. Order the parties to meet in a technical session to develop a procedural schedule for the first phase of the docket and to review and respond to FairPoint's current operational and financial issues;
- E. Immediately direct FairPoint to certify to the Commission that it is preserving all documents related to preparations for, execution of, and ongoing work related to cutover for the purposes of a future root cause analysis;
- F. Require that all communications and meetings, whether in person or telephonic, between Staff, Liberty and FairPoint are provided or open to the OCA and other affected parties;

- G. Designate the Director of the Commission's Telecommunications Division and other Staff as appropriate as "Staff Advocates" pursuant to RSA 363:32; and
- H. Grant such other relief as justice requires.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition was forwarded this day to the parties in DT 07-011 by electronic mail.

July 17, 2009



Meredith A. Hatfield