

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	LEGAL STANDARD OF REVIEW	3
A.	The Commission Should Apply the Legal Standard Set Forth in its Approval Order in DT 07-011 to Consider all the Important Interests at Stake, Including CLECs Interests, to Determine What is Reasonable.....	3
III.	APPLYING THE LEGAL STANDARD OF PUC 203.20 THE COMMISSION CANNOT FIND THE REGULATORY SETTLEMENT JUST, REASONABLE AND IN THE PUBLIC INTEREST WITHOUT FURTHER CONDITIONS THAT PROTECT WHOLESALE CLEC CUSTOMERS FROM FURTHER HARMS.	7
A.	It is Undisputed That Fairpoint has Failed to Deliver Service Even at the Levels That Were Provided When Verizon was the ILEC.....	8
1.	The CLECs’ testimony presents clear and convincing evidence that there continue to be unacceptable levels of service deterioration that adversely impact the ability of CLECs to provide services to their customers.....	8
B.	Fairpoint’s Reporting of Wholesale Service Quality in the PAP Confirms That There Remain Unacceptable Degradation of Service Since Cutover.	13
C.	The Commission Should Find Little Comfort in the Recent \$200,000 Drop in PAP Penalties That Coincide With the Completion of the Metrics Remediation Efforts in Fairpoint’s CDIP Project.	15
1.	These results are both untested by any audit or third party and are suspicious given FairPoint’s stated goal to reduce penalty payments through the metrics reporting process.....	15
D.	Given That CLECs/Wholesale Interests Were not Represented Directly in the Regulatory Settlement the Commission Should Independently Evaluate the Status of FairPoint’s Implementation of its Promises to Provide CLECs With Services Better Than Verizon.....	17
1.	The terms of the CLEC settlement remain in effect and are binding upon FairPoint	19
E.	Providing CLECs With Service on Just and Reasonable Rates, Terms and Conditions is Particularly Important Given That FairPoint’s Financial Projections Depend on Revenues From CLECs	21
1.	If FairPoint’s financial projections fail – there will be extra incentive for FP to cut costs and services to CLECs and to otherwise provide unfair treatment in win back efforts to claw back retail customers that have left for CLECs.....	23
F.	As a Result of the Adverse Impacts to CLECs Caused by FairPoint, and the Likelihood of Continued Harms, Merely Continuing the Status Quo for CLECs – as is Contemplated by the Regulatory Settlement – is not in the Public Interest.....	25
1.	The Commission should impose protective conditions on FairPoint’s requests for approvals	25
IV.	CONCLUSION	26

I. INTRODUCTION

BayRing Communications (“BayRing”) and segTEL, Inc. (“segTEL”) remain very cautious about the prospects for FairPoint Communication’s (“FairPoint” or the “Company”) success due to the significant difficulties BayRing and segTel experienced after FairPoint cutover from Verizon’s services and the significant issues that remain more than one year after the cutover process. BayRing and segTEL, along with other CLECs, and, in fact, all of FairPoint’s wholesale and retail customers, did not obtain the benefits that were promised by FairPoint during the DT-07-011 proceeding. On the contrary, CLECs continue to experience on-going problems with FairPoint, as described in testimony and as summarized below. This proceeding offers the Commission an opportunity to examine the financial projections of FairPoint as it seeks to emerge from bankruptcy, as well as to determine whether the Regulatory Settlement is in the public interest for all customers, including FairPoint’s wholesale customers, such as the CLECs.

CLECs understand that the primary focus for the Commission in this proceeding is whether FairPoint will emerge from bankruptcy in the form of a competent and stable company capable of meeting all of its wholesale and retail obligations. While the CLECs have not been privy to the detailed financial information due to confidentiality restrictions, the Commission will need to assess carefully the present financial condition of FairPoint as well as the probability that its future goals can be achieved. The preliminary data does not inspire confidence. For example, CLECs are aware that FairPoint makes a “daily cash activity” report to the Commissions and that the Vermont Public Service Board is currently concerned with FairPoint’s reports of available cash to meet its obligations. Presumably FairPoint is also filing similar

“daily cash activity” reports with New Hampshire, again, a confidential document shielded from CLECs. If, in fact, New Hampshire gets “daily cash activity” reports from FairPoint, and if an analysis of such reports indicates a substantial decrease in cash on hand, this would suggest that FairPoint, even when completely relieved of its pre-petition debt obligations, may yet again have financial difficulties that will bring us right back to the problems that the citizens of New Hampshire have been dealing with for more than a year as a result of the disastrous cutover from Verizon to FairPoint. Thus the threshold question of whether FairPoint can successfully emerge from bankruptcy, if answered “no” may alone lead the Commission to determine that the Regulatory Settlement is not in the public interest.

If that threshold question is answered, “yes”, then FairPoint’s petition requires the Commission to make a number of additional determinations, notably whether the Regulatory Settlement Agreement will bring benefits to all customers, including CLECs, as well as whether the proposed transactions are in the public interest. Although a recent Maine Examiner’s Report, in Docket No. 2010-76 recommends that operational problems are not relevant to these determinations, these CLECs respectfully disagree. Service quality and operational concerns, and the resulting impact on the financial health of FairPoint, remain important public interest considerations that should not be ignored in reviewing this petition. According to the parties to the Regulatory Settlement Agreement, CLECs were not included due to a belief that the terms of the CLEC Settlement Agreement would continue in force as sufficient to protect customers.

From BayRing’s and segTEL’s perspective, however, FairPoint has failed to abide by the terms of the CLEC Settlement and the FairPoint transition to its new systems following cutover has imposed severe hardships to CLECs that are not consistent with the commitments made by FairPoint in the CLEC Settlement. On the contrary, there remain few, if any, real net benefits of

FairPoint's services for CLEC customers compared to Verizon's pre-cutover services. Acting on its own, FairPoint has failed to deliver on its commitment to provide service equal to or better than Verizon. Consequently, the Commission should set forth the necessary conditions that will force FairPoint to reach these service level commitments. The Commission should not leave CLECs out to fend for themselves as FairPoint struggles to emerge from its bankruptcy process and to stay out of bankruptcy thereafter.

II. LEGAL STANDARD OF REVIEW

A. The Commission Should Apply the Legal Standard Set Forth in its Approval Order in DT 07-011 to Consider all the Important Interests at Stake, Including CLECs Interests, to Determine What is Reasonable.

In reviewing the Settlement Agreement, the first question the Commission must determine is the applicable legal standard for the review of the approvals FairPoint seeks in this proceeding. This is not so simple as it may appear, given the complexities involved in the state's primary incumbent LEC seeking a corporate reorganization in bankruptcy and the interplay of the federal bankruptcy proceeding with this Commission's authority to regulate the incumbent LEC as a public utility. In its Petition, FairPoint suggest that its request is a straightforward approval under RSA 369:8, II(b) for transactions involving change of control of its parent companies, and suggests that the Regulatory Settlement must be approved, without conditions, or else some sort of bankruptcy doomsday scenario will result and cause substantial litigation and further delay to the detriment of consumers. However, BayRing and segTEL suggest that the authorizations requested in this proceeding are neither as straightforward nor as simple as FairPoint suggests, especially given the disastrous and unfortunate ongoing transition from Verizon systems to FairPoint's systems in New Hampshire. The issues at stake in this Docket are of grave importance to retail and wholesale end users alike and deserve more than a simple

expedited ruling. Furthermore, FairPoint has not produced any compelling evidence that a rigorous and substantial investigation will create any such doomsday scenario, or what that scenario might even be.

It is clear from FairPoint's requests that there are a number of considerations that the Commission must make in its determinations of the quality and suitability of FairPoint to continue its operations as a reorganized company following its bankruptcy proceeding. FairPoint requests that the Commission determine that the Regulatory Settlement is just and reasonable and serves the public interest in accordance with PUC 203.20. Petition at 11. The Commission has previously explained, however, that even an approval of a settlement *with all the parties* must be reviewed under the applicable standards. 2008 Approval Order at 39.

The Regulatory Settlement certainly did not represent the interests of wholesale customers, such as CLECs. While it is true that N.H. Code Admin. Rules PUC 203.20 (b) authorizes the Commission to approve disposition of any contested case by settlement "if it determines that the result is just and reasonable and serves the public interest" (*See also* RSA 541- A:31, V(a)), in a case where not all the parties are represented by the settlement the Commission should be very cautious in making sure that the terms are in the public interest.

FairPoint also presents the Commission with a change of control request as a result of its bankruptcy process, and cites to the requirement for the Commission to determine that the change in control of the Company via the bankruptcy process "will not have an adverse effect on the public utility rates, terms, service or operation of" the Company in New Hampshire, in accordance with RSA 369:8,II(b). Petition at 11. FairPoint further seeks approval of its requested modifications to the 2008 Order No. 24,823 in DT-07-011 ("Approval Order"), in accordance with RSA 365:28, as well as approval for the pledge by FairPoint of the membership

interests in VT Telco, pursuant to RSA369:2. Petition at 11. In short, FairPoint seeks a number of determinations, under a number of different statutes and rules.

The Commission previously examined the governing standards for its review when faced by a similar array of statutes in the first FairPoint request in DT-07-011. BayRing suggests that the legal standard articulated by the Commission in its Approval Order in DT-07-011 presents the proper framework for the Commission's analysis of the various requests set forth in FairPoint's Petition. In its Approval Order in DT-07-011 and in citing RSA 374:26, the Commission determined that "New Hampshire law requires the Commission to determine that these transactions are in the public interest prior to their consummation, *explicitly vesting the Commission with authority to impose appropriate conditions for such authority.*" Approval Order at 37-39 (emphasis added). The Commission should similarly assert its authority to impose whatever conditions it believes are necessary to protect CLECs from further harms that are likely to present themselves in the course of FairPoint's efforts to emerge from bankruptcy and remain solvent.

FairPoint, once again, seeks authorization to continue its operations under new controlling interests and new terms set forth by its bankruptcy proceedings and its efforts to alter the Commission's authorization in DT-07-011. Once again, FairPoint is requesting authorization to provide services as a reorganized company, which suggests again that the authority vested in the Commission by RSA 374:26 is relevant. That law, as noted by the Commission in its 2008 Approval Order, expressly authorizes the Commission to undertake a broad based "public interest" assessment of the request to operate as a public utility, and that precludes the commencement of service as a public utility in this state unless, "after due hearing," the [Commission] may prescribe such terms and conditions for the exercise of the privilege granted

under such permission as it shall consider for the public interest.” 2008 Approval Order at 37-38. (quoting RSA 374:26).

When there are a variety of statutes that are applicable, and where the issues are quite complex, the Commission considers “all the interests involved and all the circumstances in determining what is reasonable.” 2008 Approval Order at 38, (citing *National Grid plc*, Order No. 24,777 (July 12, 2007) and quoting from *Grafton County Electric Light and Power Co. v. State*, 77 N.H. 539, 540 (1915); *Parker-Young Co. v. State*, 83 N.H. 551, 561-562 (1929); and *Appeal of Pinetree Power*, 152, N.H. 92, 97 (2005)). The Commission should once again examine the “managerial, financial and technical ability of the proposed transferee to operate a public utility.” 2008 Approval Order at 38 (citing *Atkinson Area Waste Water Recycling Co.*, Order No. 24,817 (Jan. 11, 2008)). The Commission should, again, undertake a “holistic” review of these transactions, “to consider what FairPoint has committed to doing in New Hampshire and the effects of those commitments.” Approval Order at 71. Also, as the Commission pointed out in DT-07-011, FairPoint, as the petitioner, bears the burden of proof and must therefore establish factual propositions by a preponderance of the evidence. NH Code Admin. R. Puc 203.25.

In the event that the Commission is convinced that there are real risks of failure of the projections and plans advocated by FairPoint, or where there is a real risk of adverse harm to ratepayers and customers, including wholesale customers, the Commission should exercise its authority to reject the requests for approvals or modifications, unless the Commission determines that any approval can only proceed with certain protective conditions. Given FairPoint’s terrible track record in its first two years of operations in New Hampshire, the

Commission, at minimum should impose several conditions to protect ratepayers, as well as CLECs from further adverse harms from these latest FairPoint approval requests.

III. APPLYING THE LEGAL STANDARD OF PUC 203.20 THE COMMISSION CANNOT FIND THE REGULATORY SETTLEMENT JUST, REASONABLE AND IN THE PUBLIC INTEREST WITHOUT FURTHER CONDITIONS THAT PROTECT WHOLESALE CLEC CUSTOMERS FROM FURTHER HARMS.

Before turning to the terms of the Regulatory Settlement, an important starting point for the Commission is to establish whether FairPoint has delivered on its promise to CLECs that it would provide service at or better than what CLECs experienced when Verizon was the incumbent LEC and supplier of essential wholesale inputs, such as unbundled network elements (“UNEs”) or products made available to CLECs under a resale arrangement. The Commission authorized the transfer of control from Verizon to FairPoint and approved the Staff Settlement and CLEC Settlement as necessary conditions to its approvals in DT-07-011. Ms. Bailey’s testimony correctly quotes the Commission’s conclusion from its Order in DT-07-011, where the Commission pointed out that FairPoint “has also made binding promises about service quality, relations with wholesale customers” among other commitments. Staff Adv. 1 (Bailey Testimony at 2)

During the proceedings in DT-07-011 FairPoint promised to deliver better service quality to CLECs than what CLECs experienced with Verizon. FairPoint incorporated its commitments to maintain at least the same levels of service as expressed in the terms of the CLEC Settlement. No one, not even FairPoint, argues that FairPoint has even provided wholesale CLEC services at an equal (much less superior) level of service compared to that experienced under Verizon. The evidence is irrefutable that FairPoint has failed to deliver on its fundamental promise to deliver services at a level better than what CLECs experienced from Verizon.

A. It is Undisputed That FairPoint has Failed to Deliver Service Even at the Levels That Were Provided When Verizon was the ILEC.

1. The CLECs' testimony presents clear and convincing evidence that there continue to be unacceptable levels of service deterioration that adversely impact the ability of CLECs to provide services to their customers.

FairPoint concedes that it has experienced a greater percentage of problems for wholesale order processing as compared to its retail process. Tr. 05/23/2010 (a.m.) at 204, and the testimony of CLEC witnesses, summarized below, confirms that FairPoint's OSS remains a source of serious concern. While the Commission only heard testimony from CLECs on this topic, we encourage the Commission to consider that retail customers are not going to come forward and provide numerous and widespread examples of how FairPoint's operations are failing; the Company did not provide witnesses internally to discuss how well or poorly FairPoint's operations impact the company's ability to serve its customers, but CLEC testimony abounds with examples of how the company's operations are failing.

Given that the systems in place are largely shared between the retail and wholesale operations of the Company, the CLEC testimony is evidence that the Company's systems and operations as a whole continue to have serious and numerous flaws remaining that need to be addressed. If this is the case, the Company must be prepared to correct such flaws, requiring additional investment that BayRing and segTEL suggest the Company isn't prepared to make given all of its financial difficulties.

In any case, the dramatic degradation in service quality described in the testimony of the CLEC witnesses. Ms Wilusz, on behalf of BayRing, details just a few of the more severe examples from the list of approximately 60 service failures that CLECs described to FairPoint. BR-1. Ms. Wilusz convincingly describes in great detail the problems CLECs are subjected to as

a result of FairPoint's continuing failure to provide accurate Customer Service Record (CSR) information and false completion notices for provisioning (PCN) and billing (BCN). The billing issues are further testified through the troubling examples provided by CRC witnesses Mr. Tisdale and Mr. Winchester, in CRC 1 and 2 respectively.

Ms Wilusz, as well as other CLEC witnesses, describes the problems that BayRing continues to have to account for FairPoint's unacceptable high levels of manual processes caused by, among other things, faulty circuit identifications and the lack of a functional system. Ms. Wilusz also describes the difficulties BayRing faces by almost all of the resale orders with customer loss of service, an especially sensitive concern for some of BayRing's public safety customers, such as police and fire departments. Ms. Wilusz also identifies the struggles BayRing's staff confront when the Line Loss Report (for resale customers and correct billing) and Listing Verification Reports (for accurate directory listing information) are inaccurate.

As Ms. Wilusz points out, many of these concerns were identified to Liberty Consulting Group in their review of the cutover to FairPoint systems and many remain unresolved today, as further reflected in the testimony of other CLEC witnesses. Finally, Ms. Wilusz explains that these systemic failures force CLECs to incur real costs, such as increasing manual staff time in both provisioning and repair departments. Mr. Winchester, on behalf of CRC Communications similarly explains the inefficiencies and excess costs that CLECs alone must suffer by FairPoint system failures. In short, Ms. Wilusz concludes that instead of providing improvements to services, the cutover to FairPoint systems have produced a backward development from Verizon, a conclusion that is buttressed even by FairPoint's PAP reports.

Other CLEC witnesses provide convincing proof of the continued levels of poor service. Ms. Mullholand, on behalf of segTEL, provides a list of the problems faced by CLECS following

cutover, including problems with Caller ID functionality, Pre Order failures for CSR, Directory Listing and Loop Qualification data, Ordering and Repairs, to name a few. Notably, Ms. Mullholand testifies that even after more than a year of efforts to correct these deficiencies there continue to be service failures. According to Ms. Mullholand, “[d]espite more than a year of asserted industrious activity on the part of FairPoint and Capgemini, FairPoint’s systems still fail in many key areas.” segTEL 1 at 6; Tr. 05/25/2010 (p.m.) at 86.

Ms. Mullholand accurately outlines for the Commission the system failures, through testimony that highlights several of the problems identified by Ms. Wilusz, on behalf of BayRing, and Mr. Winchester and Mr. Tisdale, on behalf of CRC Communications. Mr. Winchester provides irrefutable testimony of the difficulties faced by CLECs in the transition from a system that, although complex and difficult, it generally “worked” with Verizon, to a Company that has failed to “replicate a ‘business as usual’ environment.” CRC 1, Winchester at 3-4. Mr. Winchester similarly highlights the problems faced by CLECs with access to accurate customer service records and loop qualification tools, with particular emphasis on the “shocking” levels of errors in directory listings. CRC 1, Winchester at 4-5

In the face of this overwhelming and troubling CLEC testimony of continuous and systemic failures of FairPoint’s attempts to transition from Verizon to a “new and improved” OSS, FairPoint’s witnesses essentially confirm that they are not providing adequate levels of service to CLECs. In response to BayRing Witness Wilusz, Mr. Nolting testifies “I agree that we had an unacceptable number of errors in 2009, as Liberty Consulting Group reported in the September 2009 comments that Ms. Wilusz referenced in her testimony.” FP-14, Nolting Rebuttal at 3. Mr. Murtha corroborates the problems that the CLECs describe. FP-10, Murtha at 4. Mr. Lamphere testifies that “[t]he cutover to new FairPoint systems resulted in a higher than

anticipated number of orders not flowing through the systems. These orders needed to be handled through a manual provisioning processes, often causing delays, which were sometimes significant, in the completion of orders.” FP-11, Lamphere at 2-3. Mr. Nolting also corroborates that “there have been billing errors and perceptions of billing errors since the cutover from Verizon systems.” FP-14, Nolting at 9; See also, Tr. 05/24/2010 (a.m.) at 147 (“we need to better with processing orders...”) Finally, many of the problems that the CLEC witnesses outlined are the subject areas for the key projects that FairPoint and Accenture identify in the on-going CDIP project, as detailed in Confidential Exhibit VW-3 (CDIP Assessment Project Summary as of 25-Nov-09), which are still being worked on. See FP-26.

Not surprisingly, FairPoint’s witnesses attempt to establish that they have made “improvements” since more than a year of repeated failure. Mr. Murtha provides unaudited and subjectively produced “reports” in his exhibits attempting to convince the Commission that FairPoint has made improvements to customer “flow through” orders (Exhibit RM-2). The Commission should not place any degree of confidence in the reliability of these reports. As Ms. Wilusz points out, on not one, but two separate occasions FairPoint has reported on improved “flow through” rates of processing orders only to have Liberty Consulting Group disagree and challenge the reliability of FairPoint’s assessment. BR-1, Wilusz at 17-20.

For example, in the July 2009 Liberty evaluation of FairPoint’s flow through figures they pointed out the “improved accuracy” of FairPoint’s information “remains questionable.” BR-2 (Liberty Assessment of FairPoint’s Stabilization Plan Status Report, July 13, 2009 -submitted by Staff Memo in DT 07-011 on July 14, 2009). The July 13, 2009 Liberty Report further explains why FairPoint’s order flow through numbers are inaccurate, and reiterated the problems of manual work-arounds and how FairPoint’s systems skew the results. Id. Similarly, Staff’s Memo

of July 14, 2009 also pointed out how “Liberty’s assessment points out inconsistencies between data reported by FairPoint and Staffs’ experience in the three states, as well as inconsistencies in data reported by FairPoint, and areas where FairPoint does not address in its report. BR-3.

Liberty concludes FairPoint cannot be considered to have returned to normalized operations.”

Id. Mr. Murtha’s reports are quite simply difficult to believe when they have never been independently verified and remain confronted by the clear and convincing evidence presented by several CLEC witnesses. The evidence is convincing that these problems still remain at an alarming and unacceptable level and the Commission is correct that there is a disconnect between what FairPoint claims is a problem resolved and the truth of whether it really is fixed. Tr. 03/24/2010 (a.m.) at 260 (Questions from the Cmmr Ignatius.)

The April 2010 Report prepared by the Accion Group, on behalf of the Advisory Staff, further summarized the recent failures of FairPoint’s support systems. According to this report, FairPoint’s newly designed systems “were unsuccessful as the systems did not perform to the level required – while FairPoint has undertaken efforts to correct these system failings” Accion points out that there remain several areas in need for development. Non Advocate Staff 2C – Initial Accion Report at 16-17.

As for recent developments, the May 11, 2010 Liberty Consulting Group E-Mail summary of FairPoint service quality trends as reported in Vermont contradicts FairPoint’s claims that there are dramatic improvements. According to this latest summary (contained in OC Exhibit 20), for “Late Orders – Wholesale” while Liberty points out some improvements “it remains to be seen whether this is a short term fluctuation or a genuine trend.” As for “Late Orders that are late > 20 days, “FairPoint continues to have a very high percentage of its late LSRs that are late for more than 20 days, generally running in the 50% range . . .” and for ASRs

“these very late orders continue to be a serious problem with 60 percent of the late ASRs missing the due date by more than 20 days.” segTEL’s witness, Ms. Mullholand further updates that the Regression Feedback report contained in SegTEL-2 shows that FairPoint’s understanding of a problem solved does not translate into current conditions. These represent just a few examples from recent independent reviews that contradict FairPoint’s assertions that suggest that CLEC concerns are exaggerated or almost completely corrected.

In short, CLEC accounts of continued poor service are corroborated by the substantially larger PAP calculations throughout 2009 and into 2010 and supported by independent analysis of Liberty Consulting Group, and also in the findings of the Staff Consultant – Accion Group (“ . . . the support system of FairPoint is, at present, underdeveloped and failures in this area would adversely impair successful completion of the restructuring.” Non-Advocate Staff 2C , Accion Report of 4/19/2010 at 6. The only party that claims that there have been vast improvements is FairPoint, and there is no independent or objective evidence in this record that supports FairPoint’s claim. For these reasons, the Commission should reject any claim by FairPoint that it has made significant or measurable improvements in the past several months. The Commission should find that FairPoint has failed to deliver on its commitment to provide services better, or even at the same level, as Verizon.

B. FairPoint’s Reporting of Wholesale Service Quality in the PAP Confirms That There Remain Unacceptable Degradation of Service Since Cutover.

FairPoint’s PAP monthly summary reports to date (which CLECs continue to question the accuracy of, as pointed out below) nonetheless establish that FairPoint’s systems have caused adverse harm to CLECs and prove that FairPoint delivers not better service, but worse service than when Verizon supplied CLECs with wholesale services. The following Table (derived from

the PAP Monthly Reports provided in response to OC Exh 21) summarizes the monthly total PAP penalty payment/credits from before and after the cutover from Verizon systems. As CRC's witness Mr. Winchester emphasized, it is important for the Commission to appreciate that CLECs "would much rather receive wholesale services that meet the PAP and C2C guidelines than penalty money which does not make up for the lost resources devoted to rectifying issues caused by the failures to meet the measures." CRC 1, Winchester at 9.

DATE	PENALTY
January 2009 (FP Pre Cutover Using Verizon systems)	\$234,687
March 2009 (FairPoint's systems)	\$1,547,381
April 2009	\$1,594,517
May 2009	\$1,728,979
June 2009	\$1,409,295
July 2009	\$1,308,416
August 2009	\$1,643,163
September 2009	\$1,139,691
October 2009	\$1,125,979
November 2009	\$1,153,046
December 2009	\$979,984
January 2010	\$843,463
February 2010	\$820,974
March 2010	\$631,865

Even these unaudited reports, completely developed and produced by FairPoint using the PAP as a guide, establish that for all of 2009 CLEC's suffered degradation in service quality at levels unprecedented in New Hampshire. According to these PAP Monthly Report summaries, for all the "net benefits" promised to CLECs by the terms of the transfer from Verizon to FairPoint, CLECs were instead provided deplorable service which measured by FairPoint's PAP

reports were in the range of 400-600% worse (payments of \$250,000 under Verizon to \$1 million to \$1.5 million) throughout 2009, to approximately 2 to 3 times worse thus far in 2010.

C. The Commission Should Find Little Comfort in the Recent \$200,000 Drop in PAP Penalties That Coincide With the Completion of the Metrics Remediation Efforts in FairPoint's CDIP Project.

1. These results are both untested by any audit or third party and are suspicious given FairPoint's stated goal to reduce penalty payments through the metrics reporting process.

As part of FairPoint's CDIP Program, FairPoint has identified "Metrics Remediation" as one of the "high priority" projects identified by Accenture, as discussed in the testimony of Jeffrey Allen and Vicky Weatherwax. Further details are provided in the Summary Assessment of the CDIP Project, as contained in Confidential Exhibit VW-3. The description of scope, and key performance indicators for the Metrics Remediation project reveal that FairPoint has lost sight of the purpose of the C2C and PAP metrics. Common sense and logic suggest that the metrics should measure what levels of service FairPoint provides to CLECs and that the metrics do not control whether FairPoint provides quality service; on the contrary, FairPoint's operational management and staff control the level of services that FairPoint provides to CLECs.

According to the information provided by FairPoint in confidential Exhibit VW-3, the Metrics Remediation project is an effort to examine *where the metrics are producing penalties, and then to change the metrics to reduce the amount of penalties*. The Project Summary document describes the "Project Description/Metrics Remediation" project this way: "*The metrics that are driving fines need to continue to be reviewed and remediated.*" [Emphasis added.] The "Key Performance Indicators" to determine the success of the Metrics Remediation project are not, as is the case with many of the other CDIP projects "improved accuracy." Instead, the Metrics Remediation project has a performance measurement stated as

“Penalties/cost avoidance (~ 20-30% reduction of current penalties).” [Emphasis added.]

Reducing penalties is, according to FairPoint, the overall measure of success. Tr. 05/25/2010 (a.m.) at 73. And, the potential benefits are not described in the report as improving the accuracy of the metrics reporting, but instead are stated as “reduction in penalties – More accurate insight into operational performance – Improve market perception.” Pushing for changes to the metrics to decrease penalties, and not to improve services to CLECs, proves that FairPoint has lost sight of the purpose of accurate metrics and appears to be undertaking efforts to manipulate the reports to give the appearance of improvements in service and to put more revenue in its accounts instead of properly crediting CLECs for poor service.

Not content with the Commission’s determinations that the current PAP shall be honored, FairPoint has developed and advertised a program where it takes into its own hands the determination of how penalties shall be assessed and measured. Not content with the Agreements it freely entered into in DT 07-011, FairPoint shows here its disregard for and lack of commitment to those agreements and to wholesale service quality.

FairPoint testified that it completed its Metrics Remediation program in March 2010. Tr. 05/24/2010 (a.m.) at 180; See also FP-26C. Not surprisingly the PAP payments have dropped in line with the 20-30% performance goal of the Metrics Remediation (from \$800,000 to \$600,000, and to \$400,000 (April liability in NH)). While even this drop in PAP is still 3 times worse than the PAP penalties paid by Verizon before cutover, the evidence offered by the CLECs certainly does not confirm any such dramatic improvements in service quality. The Commission must be skeptical regarding what type of changes drove the decrease in PAP payments. At the hearing, FairPoint witness McLean suggests that the PAP results show that FairPoint is providing improved service; however, the Commission should be very suspicious of FairPoint’s

manipulations to the PAP metrics under a program with a performance goal of driving down penalty payments.

Another concern raised by FairPoint's Metrics Remediation project is the complete lack of involvement with CLECs, an independent audit, or authorization from the Commission to change the metrics and PAP. FairPoint testified at hearing of their intent to "partner" with CLECs. Tr. 05/24/2010 (a.m.) at 44. And, the CLEC Settlement requires FairPoint to work with CLECs to simplify and modify the C2C and PAP metrics, and to obtain authorization from the Commission. FP Exhibit 2. CLECs still have not seen the simplified PAP document. Tr. 05/25/2010 (p.m.) at 19. The CLEC Settlement further requires an independent audit of FairPoint's implementation of the existing PAP. Id. FairPoint has evidently ignored these commitments and does not take its talk of "partners" with CLECs seriously. Instead FairPoint has embarked on its own efforts to modify the PAP metrics to give the appearance of better service quality, when the real goal is plainly stated on the CDIP project summary – reduce the penalties paid to CLECs. The Commission should investigate FairPoint's treatment of the PAP, stop FairPoint's unilateral efforts to change the PAP metrics, force the Company to abide by the terms of the CLEC Settlement to require CLEC involvement before PAP metrics are further manipulated, and to provide CLECs with detailed records of any metric alterations since cutover.

D. Given That CLECs/Wholesale Interests Were not Represented Directly in the Regulatory Settlement the Commission Should Independently Evaluate the Status of FairPoint's Implementation of its Promises to Provide CLECs With Services Better Than Verizon

The terms of the Regulatory Settlement do not have any provisions that attempt to address any of the CLEC concerns that are summarized in the testimony and described in this brief. This is confirmed also in the "Summary of the New Hampshire Regulatory Settlement"

contained as Exhibit AG-3 to the testimony of Alfred C. Giammarino, where the summary does not mention any specific items that concern CLECs. Rather, the terms of the Agreement express the parties intent to leave alone the commitments made by FairPoint in the CLEC Settlement Agreement, as indicated in the heading to Section 2 and its reference to the Staff Settlement Agreement in footnote 1 (page 3), which includes the terms of the CLEC Settlement Agreement. See FP-2.

The parties' intent to leave the terms of the existing CLEC Settlement is further confirmed by Ms. Bailey, on behalf of one of the parties to the Regulatory Settlement. Staff Adv. 1, Bailey Testimony at 12 (the agreement "leaves unchanged [FairPoint's] commitments to wholesale providers."). BayRing and segTEL signed the CLEC Settlement even though it had concerns over FairPoint's abilities to perform in New Hampshire and follow through on the commitments made in the CLEC settlement. BayRing's and segTEL's concerns have been significantly magnified based on FairPoint's performance over the past two years. Unfortunately due to poor performance BayRing or other CLECs have not enjoyed any of the benefits of that Settlement. Without any attempt to address the on-going adverse harms caused to CLECs by FairPoint's systemic failures the Commission must undertake a careful effort to protect CLECs from further harm when and if FairPoint emerges from bankruptcy as a reorganized entity. In addition, pursuant to PUC 369:8 FairPoint's Change of Control request cannot be supported, without further protections, when there have been obvious and continuous "adverse impacts" to CLECs that contradict the "no adverse impact" standard of PUC 369:8.

BayRing and segTEL continue to be alarmed at the ever-increasing disparity in treatment between FairPoint's retail and wholesale customers, and between FairPoint's regulated and unregulated revenue streams. The PAP confirms, and no party can argue, that substantial

disparity exists between FairPoint's retail performance and FairPoint's wholesale performance. To the extent that the Regulatory Settlement seeks to enhance service obligations to retail customers while leaving wholesale obligations unchanged, the failure of parity is exacerbated. The basic obligation to enforce parity cannot be neglected. Furthermore, the Regulatory Settlement devotes substantial emphasis to broadband deployment which is a service that does not exist under the PUC's regulatory purview. While broadband deployment may be in the general public interest, it should not be emphasized and encouraged to the detriment of basic and reliable wireline service provisioning, maintenance, and repair.

1. The terms of the CLEC settlement remain in effect and are binding upon FairPoint

The evidence developed in this record further confirms that the Regulatory Settlement leaves unchanged the commitments expressed in the CLEC Settlement Agreement. See OC-5, FP Response to Joint CLECs DR Nos. 1; Otel 4, FP Response to Comcast DR Nos. 1-1, 1-2, 1-4 through 1-27. In addition, FairPoint further indicates it "will not reject any wholesale agreements with competitive local exchange carriers, e.g. Section 252 interconnection agreements, wholesale tariffs, "commercial agreements" such as Wholesale Advantage Agreements or VISTA Agreements, or settlement agreements related to its acquisition of Verizon's assets in DT 07-011." FP-13, Hood Testimony at 7. Tr. 05/25/2010 (p.m.) at 15.

At the same time that FairPoint suggests that it will not take any actions in bankruptcy to avoid its agreements and tariffs with wholesale carriers, FairPoint holds out the possibility that it will continue to reject certain wholesale contracts in bankruptcy. FP-13, Hood Testimony at 7. BayRing and segTEL point out that FairPoint has not requested modification from the Approval Order with regards to the terms of the CLEC Settlement Agreement. The Commission should

therefore confirm that the terms of the CLEC Settlement Agreement remain binding on FairPoint and in addition, the Commission should extend the periods of time under the Agreement (for five years) to allow the parties to enjoy the benefits of the CLEC Settlement during a time that FairPoint's systems actually work to ensure that any analysis of future service costs, etc. are based on a business as usual model (or based on a business better than Verizon model, as FairPoint promised). This is particularly important as a necessary condition to any approval of FairPoint's requests here given that FairPoint's degraded services have harmed CLECS, as discussed above. BayRing and segTEL therefore support the request of the Accion Group to condition any approval by forbidding FairPoint from any rejection of the terms of the CLEC Settlement Agreement. See Non Adv. Staff 3P, Accion Supplemental Report at 15.

The Commission must impose this condition given FairPoint's failure to abide by the terms of the PAP provisions of the CLEC Settlement. In response to Joint CLECS DR No. 12 (OC-8) FairPoint confirmed that it continues to be subject to the Performance Assurance Plan and Carrier to Carrier guidelines that were imposed on FairPoint as a condition of the Approval Order in DT 07-011. However, FairPoint also states that it will continue efforts to undermine these commitments by seeking to recover retroactive payments made for poor service (OC-9 and OC-10, FP Response to CLECS DR 14 and 15), continue to pursue other waivers of the PAP to the detriment of CLECS (OC-12 and BR-6, FP Responses to CLECS DR 17-18), and, as shown above, engage in self-help. The Commission should take this opportunity to condition any approval by rejecting FairPoint's efforts to recover retroactive PAP payments (at a minimum up to the bankruptcy date) and order that PAP payments be paid 100% under the unsecured claim process through FairPoint's bankruptcy filing. FairPoint should be prevented from asking for recovery of such payments when they committed to continue the PAP process and when they

provided such poor service, which they do not and cannot dispute. Finally, FairPoint's unrelenting efforts to change and unilaterally modify the terms of the applicable metrics without any input from CLECs or authorization from the Commission further reflect a disregard for the terms of the CLEC Settlement Agreement and its commitments to work collaboratively with the CLECs toward any changes to the PAP metrics.

E. Providing CLECs With Service on Just and Reasonable Rates, Terms and Conditions is Particularly Important Given That FairPoint's Financial Projections Depend on Revenues From CLECs

The ability of FairPoint to provide quality of service to CLECs is not just a problem for the C2C and PAP metrics, it is also an important ingredient in the ability of FairPoint to successfully emerge from bankruptcy. The Accion Report and the Supplemental Accion Report point out that FairPoint's financial projections related to revenue are highly questionable, with the recent financial restatements further widening the gap from actual results to projected results. According to the Supplemental Accion Report (at 14), ". . . it must be understood that the success of the Reorganization, and the Company, is largely driven by the attainment of revenue projections which seem aggressive given the recent results of the business as well as the significant reduction in demand for certain types of telecommunications services." The Accion Group questioned the ability of FairPoint to meet its financial projections, and even this cautious statement appears optimistic given that FairPoint refused to provide the Accion Group with the details supporting its initiatives that support FairPoint's projections. Accion Supplemental Report at 11; Tr 05/24/2010 (a.m.) at 42.

According to both Mr. Lisciandro and the Accion group, FairPoint's revenue projections show declines in almost all categories except "special access." FairPoint's projections for revenue gains are almost exclusively derived from special access and data service revenues, such

as high capacity data DS3 and OSC services. Tr. 05/24/2010 (a.m.) at 82. FairPoint sells these services both to retail customers and also to wholesale customers, including CLECs. The Accion Group identifies FairPoint's success as being dependent upon the realization of these gains, yet repeatedly states that they were provided with no supporting documentation or any evidence whatsoever upon which the projections were based. FairPoint concedes that the market for these "special access" and high capacity data services is very competitive and that FairPoint must compete with several well established companies for these customers. Tr. 03/24/2010 (a.m.) at 171-172. As for data and Internet services, FairPoint testified that these represent only 10% of revenues. Tr. 03/24/2010 (a.m.) at 83. FairPoint prospects for market share appear to be dramatically overstated.

This robust competition on the retail side for these data and Internet services suggests that FairPoint will face competitive pressures as it attempts to grow special access revenues to any significant levels in the next five years without any rate increases, especially if service levels do not drastically improve. Moreover, when a customer decides to leave FairPoint to purchase these high capacity data services from CLECs FairPoint will lose the retail revenue but may continue to obtain the wholesale revenues from CLECs (other than CLECs that have their own facilities such as Cable operators) for the provision of these wholesale services. Tr. 05/26/2010 at 34-36. For this reason, CLECs remain an important source of revenue for FairPoint, including wholesale revenues from local and other access services. Tr. 05/24/2010 (a.m.) at 173 ("Right now, the wholesale market is a very significant portion of our revenue stream." FairPoint's financial projections will depend on providing many CLECs and their retail customers with quality service to ensure that these retail customers provide the source of revenue that will, in turn, be used to pay FairPoint for the wholesale inputs required by the CLEC.

1. If FairPoint's financial projections fail there will be extra incentive for FairPoint to cut costs and services to CLECs and to otherwise provide unfair treatment in efforts to win back retail customers that have left for CLECs.

FairPoint's unsubstantiated and unsustainable projections remain difficult to believe. The Commission will recall that this is the same Company (and mostly the same management personnel) that provided predictions and promises on its financial and operational success in DT-07-011 and the Commission is well aware of how FairPoint's predictions worked out in the aftermath of its Approval Order. The Commission should compare the cash on hand that FairPoint started with in April of 2008 to the projected cash on hand that FairPoint anticipates to have when it exits its reorganization process and determine what margin for error exists if business conditions again demonstrate FairPoint to be wrong. If a relatively cash-rich FairPoint failed to live up to its promises, what are the chances that a cash-poor FairPoint will deliver? FairPoint does not have a proven track record for this Commission to believe its predictions of future revenues or service quality. FairPoint's projections are also questionable since the sensitivity analysis run by Mr. Lisciandro did not account for what would happen if the revenue projections fall substantially short (by 50%) or in the event (which is likely) that fixed expenses (which make up most of FairPoint's responses) will go up over the next five years.

For example, FairPoint has already incurred substantial expenses to deal with the consequences of its failed system conversion from Verizon, such as the hiring of Accenture, and Capgemini; this raises the question of how FairPoint intends to recover in revenues for all these costs that it has incurred to correct all these system deficiencies. FairPoint additionally does not take into account any possibility that changes in regulation will negatively impact its financial performance. This is extremely disconcerting considering the present FCC investigations on

special access rates, the potential for a new regulatory scheme for broadband services, or the possibility that substantial federal grant money will come into Northern New England for the purposes of building fiber networks that overlap and mirror FairPoint's VantagePoint network.

Tr. 05/25/2010 (a.m.) at 40.

FairPoint testifies that it will not be seeking to recover expenses at this point from wholesale customers in the form of rate increases for wholesale tariffed services and that it has no current plans for a rate increase in UNE rates. Tr. 05/24/2010 (a.m.) at 51-52. Tr. 05/25/2010 (p.m.) at 31. However, in the event that expenses do increase, coupled with the fact that revenues are likely not to develop as FairPoint assumes, there will be tremendous pressure on the company to either cut costs and services to wholesale customers in an effort to win back the retail customers. At the same time, FairPoint testifies that it "would certainly expect FairPoint to consider the cost of its systems to be included in any type of rate proceeding that it would go into." Tr. 05/25/2010 (p.m.) at 34. There will be additional pressure to raise rates on wholesale customers, particularly to recover back these costs associated with system modifications. In brief, FairPoint's rosy projections and plans not to seek cost recovery from CLECs, when translated into reality and without protective mechanisms put in place by this Commission, suggest that CLECs will have to deal with further degradation in service, as well as FairPoint efforts to raise revenues from CLECs through rate increases.

F. As a Result of the Adverse Impacts to CLECs Caused by FairPoint, and the Likelihood of Continued Harms, Merely Continuing the Status Quo for CLECs – as is Contemplated by the Regulatory Settlement – is not in the Public Interest

1. The Commission should impose protective conditions on FairPoint's requests for approvals

The Supplemental Report of the Accion Group pointed out that “FairPoint will remain financially viable, but at risk, for a number of years” and that “the Company has significant challenges before financial projections can be realized.” Consequently, the Accion Group recommended a number of conditions, including further protections to the CLEC Settlement, and the importance of retaining a third party monitor selected by the Commission. BayRing and segTEL support these conditions. According to PUC 365:28 the Commission has authority to impose conditions to protect wholesale customers and their many thousands of New Hampshire customers from further harm. The Commission should, once again, utilize this authority to protect wholesale customers from further harm.

The evidence in this proceeding proves that FairPoint has failed to deliver on its promises and instead has subjected CLECs to more than a year of degradation in service quality. The evidence also shows that FairPoint continues to undertake a strategy to unravel the protections guaranteed to CLECs in the CLEC Settlement. To prevent further harm, BayRing and segTEL suggest that a number of additional conditions are warranted, including:

- a. 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
- b. Rejection of FairPoint's efforts to recover retroactive PAP payments to ensure FairPoint has some incentive to provide quality services to wholesale customers
- c. Third Party testing of FairPoint's OSS similar to what Verizon was subjected to gain its 271 approval

- d. Prevent FairPoint from recovering from CLECs in rates the cost incurred to implement the OSS changes caused by the transition from Verizon systems.
- e. Extend the Rate Freeze and Other Timelines in the CLEC Settlement To A New Five Year Period From the Date of the FairPoint Emergence From Bankruptcy
- f. Implement an Investigation Into FairPoint's Treatment of Wholesale Customers
- g. Provide an 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
- h. Other Terms That The Commission Believes Are Necessary to Protect Wholesale CLEC Customers From Further Harm

IV. CONCLUSION

At bottom, in its public interest review of FairPoint's petition the Commission should carefully examine how FairPoint has failed to deliver on its commitments to customers following the cutover from Verizon's systems. Under no circumstances should this petition be supportable if it will lead to further drain on capital away from the company, thereby leading FairPoint back in to bankruptcy and another round of agreements that FairPoint is not capable of following through. For this reason, the Commission should not merely approve another round of settlement documents without carefully imposing protective conditions.

FairPoint brings a very poor track record to the Commission when it essentially asks the Commission to take its word that it is has the financial, managerial and technical ability to turn around a Company that has failed to deliver on the commitments made to the Commission and to CLECs following the cutover from Verizon's systems. BayRing and segTEL commend Staff in seeking to obtain further protections and benefits to retail and wholesale customers in the terms of the Regulatory Settlement.

FairPoint has established a poor track record in meeting the commitments made to CLECs and Staff in the past, and have little confidence that FairPoint will magically transform itself into the kind of Company that it presented itself to be when it took over operations from

Verizon. FairPoint's service record does not bode well for customers in New Hampshire, including wholesale CLEC customers. Without firm action by this Commission to account for the lack of any extended protection to CLECs in the Regulatory Settlement, the business activities of CLECs such as BayRing and segTEL will continue to be hampered, to the detriment of their business and to its customers. The Commission should not approve the requests brought by FairPoint without the imposition of special conditions to protect CLECs from further harm.

Respectfully submitted,

BayRing Communications

By its attorneys:

Alan M. Shoer, Esquire
Adler Pollock & Sheehan, P.C.
One Citizen's Plaza, 8th Floor
Providence, Rhode Island 02903
Tel.: 401-274-7200
Fax: 401-751-0604
Email: ashoer@apslaw.com

segTEL, Inc.

By its attorneys:

Carolyn Cole, Esquire
segTEL, Inc.
P.O. Box 610
Lebanon, New Hampshire 03766
Tel. 603-676-8225
Fax 603-643-9854
Email: counsel@segtel.com

Date: June 4, 2010