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STATE OF VERMONT

PUBLIC SERVICE BOARD

Petition of Northern New England Telephone Operations LLC, Telephone Operating Company of Vermont LLC d/b/a FairPoint Communications, and Enhanced Communications of Northern New England Inc. and FairPoint Vermont, Inc. for Approval of the indirect acquisition of a controlling interest, approval of a Settlement between the Department of Public Service and FairPoint, and Modification of certain CPGs issued in Docket No. 7270, and other approvals, pursuant to 30 V.S.A. §§ 107, 108, 231, and 232	)	Docket No. 7599

MOTION TO REOPEN THE EVIDENTIARY RECORD AND FOR APPROVAL OF SECOND AMENDED PETITION

Pursuant to Public Service Board Rules 2.103, 2.204(G)(1) and 2.221 and Vermont Rule of Civil Procedure 60, Northern New England Telephone Operations LLC ("NNETO"), Telephone Operating Company of Vermont LLC d/b/a FairPoint Communications ("Telephone Operating Company of Vermont"), Enhanced Communications of Northern New England Inc. ("Enhanced Communications") and FairPoint Vermont, Inc. ("FairPoint Vermont", and together with NNETO, Telephone Operating Company of Vermont and Enhanced Communications, sometimes referred to herein as the "Joint Petitioners")[1] hereby move and request that the Vermont Public Service Board (the "Board") reopen the evidentiary record and, based upon this submission and the Joint Petitioners' previous submission, grant all of the approvals sought in Docket No. 7599 (this "Docket") as specified in the Joint Petitioners' Second Amended Petition,

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1 The Joint Petitioners, together with FairPoint Communications, Inc., collectively are referenced herein as "FairPoint".

dated May 24, 2010 (the "Second Amended Petition"). In support thereof, the Joint Petitioners state as follows:

I. INTRODUCTION AND BACKGROUND

On June 28, 2010, the Board entered an order in this Docket (the "June Order") denying the Joint Petitioners' requested approvals as set forth in their Second Amended Petition. Specifically, the Joint Petitioners had requested in their Second Amended Petition that the Board:

A. Find that the indirect acquisition of control of NNETO, Telephone Operating Company of Vermont, Enhanced Communications and FairPoint Vermont as a result of that certain Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Plan of Reorganization"), including by Silver Oak Capital, LLC ("Silver Oak")[2], will promote the public good and the general good of the State of Vermont and should be approved;

B. Find that the pledge of the membership interests of Telephone Operating Company of Vermont by NNETO is "consistent with the general good of the state" and will "promote the general good of the state" as required by 30 V.S.A. §§ 108(a) and 232(a), respectively, and should be approved; and

C. Find that the Post Filing Regulatory Settlement – Vermont, between FairPoint Parent (hereinafter defined), Telephone Operating Company of Vermont and the Department of Public Service (the "Department"), executed as of February 5, 2010 (the "Regulatory Settlement"), will promote the general good of the State of Vermont and that good cause exists to approve the Regulatory Settlement and to modify the Joint Petitioners' certificates of public good ("CPGs") pursuant to 30 V.S.A. § 231.

See Joint Petitioners' Second Amended Petition, dated May 24, 2010, at 12.

The Board denied these requests, concluding that it could not, based on the record before it, find "that FairPoint . . . demonstrated the financial capability to meets its obligations under Vermont law and its CPG as a telecommunications carrier."[3] More specifically, the Board took

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2 Based upon the additional information provided in the Prefiled Testimony (hereinafter defined) attached to this Motion, the Joint Petitioners also seek approval of the indirect acquisition of control by Silver Oak's affiliates to the extent the Board deems such approval necessary under 30 V.S.A § 107.

3 June Order at 6.

issue with the manner in which FairPoint developed its financial projections, holding that FairPoint did not adequately reference the assumptions on which they were based or demonstrate why those assumptions were reasonable.[4] Notably, however, the Board also found that "FairPoint has made substantial progress in addressing the system issues that arose following cutover and improving the retail and wholesale service quality for customers."[5] This prompted the Board to conclude that "[i]f FairPoint had demonstrated that it would be financially sound, [the Board] would likely have granted the regulatory approvals FairPoint sought on the basis of [organizational, managerial, and technical] progress."[6]

While the June Order denied the requests made in the Second Amended Petition, the Board stated that "FairPoint may submit a revised proposal that addresses our concerns and demonstrates its financial soundness..." The Board stated further that it would consider any such proposal "expeditiously."[7] By this Motion, the Joint Petitioners seek to (i) introduce additional evidence in support of their request for approvals as sought in the Second Amended Petition, (ii) provide further evidence of the Joint Petitioners' financial soundness[8] and (iii) secure promptly all of the approvals sought in the Second Amended Petition. Specifically, attached to this Motion is the Supplemental Prefiled Panel Testimony of Lisa Hood and Ajay Sabherwal (the "Prefiled Testimony"), respectively the Senior Vice President and Executive

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4 *Id.* at 7-8.

5 *Id.* at 95.

6 *Id.*

7 *See id.* at p. 95.

8 FairPoint does not waive and expressly reserves its rights to argue before the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") that the Board lacks jurisdiction to adjudicate issues related to FairPoint's "financial soundness," the feasibility of FairPoint's Plan of Reorganization (hereinafter defined) and any other issues related to FairPoint's Chapter 11 bankruptcy reorganization that FairPoint believes is appropriately adjudicated by the Bankruptcy Court.

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Vice President & Chief Financial Officer ("CFO") of FairPoint Communications, Inc. ("FairPoint Parent"). The Prefiled Testimony describes the steps FairPoint has undertaken since the issuance of the June Order to develop a comprehensive financial forecast for the 2010-2015 period that is adequately supported by "bottom-up," verifiable assumptions (the "Forecast").

The Prefiled Testimony also is accompanied and supported by detailed exhibits, including a confidential summary of the Forecast and an assessment of the Northern New England marketplace by Altman Vilandrie & Company ("AV&Co"), a leading strategy consulting firm that focuses exclusively on the communications, media, smart grid and related technology industry sectors. The AV&Co exhibit supports FairPoint's assessment of its market opportunity, market share, and revenue projections as reflected in the Forecast and in doing so helps confirm that the Forecast is reasonable and achievable.

These are not the only steps FairPoint has taken since the issuance of the June Order to address the Board's concerns. In furtherance of FairPoint's anticipated exit from bankruptcy into an increasingly competitive telecommunications marketplace, the company also retained new senior management with substantial experience in the telecommunications and technology industries. In August 2010, the company retained Paul Sunu to serve as its Chief Executive Officer ("CEO"). Mr. Sunu has served as the CEO of Hargray Communications Group, Inc., where he previously served as its CFO, and he also held the CFO position at Madison River Communications, and, before that, at Hawaiian Telecom.

Separately, in July 2010, FairPoint retained Mr. Sabherwal to serve as its CFO. As explained more fully in the Prefiled Testimony, Mr. Sabherwal has over 20 years of experience in the telecommunications industry, including experience as the CFO of Choice One Communications. These changes to FairPoint's management team complemented other key

senior management changes that were effectuated earlier this year, including the company's retention of Kathleen McLean to serve as FairPoint's Executive Vice President and Chief Information Officer.[9]

FairPoint also took steps since the issuance of the June Order to renegotiate certain aspects of its post-exit Credit Agreement with its secured lenders to provide the company with additional financial flexibility going forward. These revisions, which were based on FairPoint's Forecast, are expected to provide the company with the financial flexibility it needs to stabilize and then expand its business. The revisions also provide FairPoint with ample time to, if and when appropriate, refinance its secured debt before its stated maturity date of 2015.

Although many of the concerns articulated by the Board in its June Order pertained to financial issues, the Board also stated that it needed more information about Silver Oak, the only entity that is expected to hold 10 percent or more of the common stock of FairPoint upon the company's emergence from bankruptcy protection.[10] FairPoint believes that this Motion and the Prefiled Testimony include such additional information and, consistent with the requirements of 30 V.S.A. § 107, are responsive to the Board's statements in the June Order. Although not discussed specifically in this Motion, the accompanying testimony also includes updated financial results and additional information about the anticipated members of FairPoint's Board of Directors at emergence.

This information, together with the evidence already in the Docket, meets the applicable legal standards under Vermont law necessary for the Board to grant the requested approvals

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9 FairPoint further strengthened its management team by hiring Ken Amburn as Executive Vice President of Operations and John Hogshire as Vice President and Controller. Like the other additions to FairPoint's senior management team, Mr. Hogshire joined FairPoint with considerable financial and telecommunications experience, including nine years as Vice President and Controller for Madison River Communications. *See* Prefiled Testimony at 8-9.

10 *See* June Order at 39.

without conditions. Indeed, as previously explained in earlier submissions, it is critical to the future success of FairPoint and its emergence from Chapter 11 that the Board grant the Second Amended Petition forthwith—and without imposing new conditions on the company.

FairPoint already is a party to a Regulatory Settlement submitted for approval in this proceeding. The Regulatory Settlement affirms overwhelmingly the majority of commitments made by FairPoint to the Board and to Vermont ratepayers when the company acquired the Northern New England assets of Verizon Communications approximately two and one-half years ago. These commitments include generous broadband build out obligations not applicable to other service providers in Vermont. Indeed, the Board already has indicated that if FairPoint can demonstrate—as it clearly will through this submission—that its reorganization will leave it financially sound and able to deliver service consistent with customer expectations, the balance struck in the Regulatory Settlement should be acceptable to the Board.[11]

Importantly, bankruptcy law provides that FairPoint may seek to discharge those commitments.[12] To date it has not. The imposition of additional conditions, however, could leave FairPoint with little choice but to pursue that option. The evidence in this Docket already demonstrates the challenging conditions under which FairPoint operates today and under which FairPoint will operate in the future. Put simply, the sooner the Board approves the Second

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11 *See id.* at 95; *see also id.* at 78.

12 *See* 11 U.S.C. §§ 524(a) (providing that a discharge in a bankruptcy case (1) voids any judgment at any time obtained, (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect recover or offset any such debt, (3) operates as an injunction against the commencement or continuation of an action, the employment of a process, or an act, to recover from, or offset against, property of the debtor); 1141(d) (providing that confirmation of a plan in a chapter 11 case discharges the debtor from any debt that arose pre-confirmation). *See also* FCC v. NextWave Pers. Communs. Inc., 537 U.S. 293, 302-03 (2003) (holding that financial obligations arising from regulatory conditions imposed by the Federal Communications Commission are "debts" for purposes of federal bankruptcy law and are subject to discharge in bankruptcy).

Amended Petition without conditions, the sooner FairPoint will be positioned to emerge from Chapter 11 and the sooner the benefits of the Regulatory Settlement will inure to Vermont ratepayers. The imposition of additional new regulatory burdens only would delay FairPoint's efforts in this regard.

FairPoint appreciates the Board's recognition in its June Order that time is of the essence in this Docket.[13] Indeed, each day that FairPoint remains in bankruptcy is another day on which the company's attention cannot be focused entirely on its core mission of providing traditional and advanced telecommunications and technology services to its customer base. FairPoint appreciates the Board's desire to verify for itself the company's financial plans and projections, and FairPoint has expended considerable time and energy—as well as expense—to develop the Forecast to address that concern.

In light of the Board's statement that it would consider additional submissions in an expeditious manner, FairPoint requests that the Board review, consider and rule upon all aspects of this Motion and the renewed request for approvals, inclusive of any necessary discovery or hearings, on or before November 23, 2010. Expedited review would not prejudice any party to this Docket as the material submitted with this Motion[14] is supplemental to the extensive evidentiary record already on file with the Board in this Docket. Expedited review also is necessary to afford the Joint Petitioners, their affiliated entities and their employees with the opportunity to exit bankruptcy promptly (by December 31, 2010), shed over $1.7 billion in debt,

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13 *See* June Order at 8 and 78.

14 The detailed financial information submitted via this Motion is highly confidential and proprietary, and is submitted under seal only to the Board and the Department, subject to and in accordance with the Protective Agreement and Protective Order in this docket. It will not be provided to representatives of the competitive local exchange carriers ("CLECs") and the other entities that intervened in this Docket, consistent with prior confidential financial submissions. Reference is made to the Board's Order dated April 2, 2010, wherein the Board granted FairPoint's request for confidential treatment of certain prefiled testimony and exhibits.

and commence the "fresh start" that Chapter 11 bankruptcy protection affords them. To meet this timetable, FairPoint proposes the following procedural schedule:

1. Status Conference	Monday, November 1, 2010
2. Evidentiary Workshop with Board Participation	Monday, November 8, 2010
3. Parties' Responses	Friday, November 12, 2010
4. Additional Technical Hearing	Monday, November 15, 2010
5. Requested Final Order	Tuesday, November 23, 2010.

FairPoint is mindful that it has taken time since the June Order to develop this submission. Indeed, it is precisely because FairPoint has taken such care in developing this comprehensive submission that the company believes the Board should be in a position to review, consider and approve it promptly. The proposed schedule especially necessary due to the steps that must occur *after* Board approval to facilitate FairPoint's prompt exit from its Chapter 11 proceedings (which have been pending for one year now). As an initial matter, the requisite deadline for reconsideration of the Board's order will need to lapse before FairPoint can exit Chapter 11. Furthermore, upon receipt of the last required regulatory approval, the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") will need to convene the second phase of the confirmation hearing for FairPoint's Plan of Reorganization (the "Plan"). Notice of this hearing will need to be provided to the relevant parties and a sufficient period of time will need to elapse between the date on which notice is sent and the date on which the confirmation hearing is held. Once the second phase of the confirmation hearing occurs (and assuming the Bankruptcy Court confirms the Plan, which FairPoint expects), a sufficient number of days will need to pass before the Plan can be consummated (the "Effective Date"). FairPoint anticipates that, in the aggregate, these steps will take approximately 30 days from the date the last regulatory approval is received before

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FairPoint can exit Chapter 11. Given all this, FairPoint submits that the proposed schedule is both necessary and reasonable under the circumstances.

II. GRANTING THE REQUESTED APPROVALS WILL PROMOTE THE PUBLIC GOOD

The amendments to the post-exit Credit Agreement and the additional evidence provided through this Motion address fully the Board's concerns with respect to FairPoint's financial soundness. For these reasons, the Joint Petitioners respectfully submit that the approvals sought in the Second Amended Petition meet the requirements of 30 V.S.A §§ 107, 108, 231, 232 and should be approved promptly, without modification or conditions.

1. The Joint Petitioners' supplemental evidence demonstrates FairPoint's financial soundness and addresses all of the Board's related concerns in the June Order.

FairPoint's detailed financial Forecast is attached to the Prefiled Testimony as FRP.AS.1C (Confidential). FairPoint's personnel, in conjunction with FairPoint's financial advisor in the Chapter 11 bankruptcy proceeding, Rothschild Inc. ("Rothschild"), undertook significant time, effort and expense to produce the Forecast. To develop the Forecast, information, business needs and trending analysis was sought from all FairPoint departments. FairPoint's senior management and Rothschild then analyzed all of the data collected to construct a "bottom-up" assessment of FairPoint's anticipated operating costs, capital expenditures, and revenues over the next five years. This information was then synthesized by senior management to provide a detailed financial outlook for the company, which is reflected in the Forecast. To verify the reasonableness of the Forecast revenue outputs, FairPoint requested

that a third party consultant, AV&Co, review and comment on whether the revenue Forecast is achievable in light of the Northern New England market conditions.[15]

This effort produced a refined, current and realistic view of FairPoint's anticipated financial performance through the period ending December 31, 2015, utilizing reasonable and supportable assumptions for revenue generation and expenses based upon current and historical financial information. The Forecast demonstrates that FairPoint's financial condition is sound, albeit not without challenges from competition. From an Income Statement perspective, revenues and gross margin **BEGIN CONFIDENTIAL** XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXX **END CONFIDENTIAL** The Forecast demonstrates that reorganized FairPoint is likely to generate positive cash flow and be in a position to service the contemplated post-exit debt structure through 2015 without the need to draw down its revolving credit facility for any extended period of time.

AV&Co's assessment verified the reasonableness of the Forecast revenues, considering current and projected market conditions in the Northern New England territory. AV&Co's analysis demonstrates that FairPoint's projected modest growth in revenue is reasonable.

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15 FairPoint engaged AV&Co to assist FairPoint's management with a review of the current and projected Northern New England market for telecommunications and data services, and not to act as a witness in these or any other regulatory proceedings. FairPoint then used this information to verify certain marketplace and revenue assumptions on which FairPoint based its Forecast. For the sake of completeness, and to demonstrate further the steps FairPoint has taken to develop and test its Forecast, AV&Co's assessment is included as an exhibit to the Prefiled Testimony offered for the Board's information. *See In re E.T.*, 2008 Vt 48 at para. 13-14 (citing *State v Recor*, 150 VT. 40, 48 (1988).

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AV&Co estimated the annual business and residential wireline addressable telecommunications market in Northern New England to be in the range of **BEGIN CONFIDENTIAL** XXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX **END CONFIDENTIAL** annually during the period 2010 through 2013.

All of this data must be considered in light of FairPoint's overall market share analysis. AV&Co estimates that FairPoint has an implied market share of **BEGIN CONFIDENTIAL** XXXXXX **END CONFIDENTIAL** of the total business market for wireline voice and data services. FairPoint's implied market share for residential voice and data services is **BEGIN CONFIDENTIAL** XXXXXX **END CONFIDENTIAL**. The information confirms the obvious – that FairPoint operates in a highly competitive environment, with many of its competitors (such as cable VoIP providers and CLECs) subject to minimal regulation.[16] The AV&Co analysis demonstrates that FairPoint has opportunities to generate increased revenue from business and data services markets even with continuing residential voice access line losses.

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16 FairPoint also is well aware that Vermont Telephone Company and the Vermont Telecommunications Authority received in excess of $150.0 million in various stimulus funding awards to build telecommunications facilities in the State of Vermont. The new facilities constructed through these awards only increase the competitive pressure on FairPoint. These developments were incorporated into the company's assessment of the communications landscape and assumptions in the Forecast.

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Based upon the totality of the evidence presented, FairPoint submits that the detailed Forecast is reasonable based on current, supportable assumptions. The Forecast, when combined with the recent agreement to revise FairPoint's post-exit Credit Agreement, demonstrates that FairPoint is a financially viable entity and an entity that will be able to meet its financial obligations to the State of Vermont, as modified by the Regulatory Settlement. FairPoint respectfully submits that the Forecast and the additional evidence provided with the Supplemental Prefiled Testimony should resolve the Board's concerns as expressed in the June Order.

2. The revisions to the Credit Agreement provide the Joint Petitioners with additional financial flexibility.

FairPoint presented the Forecast and the AV&Co analysis to its secured lenders. FairPoint and the secured lenders have agreed to revise the post-exit Credit Agreement. The revisions will, among other things, loosen the financial covenants and extend the long term, secured debt amortization schedule. Most significant are the revisions to the total leverage ratio and the interest coverage ratio. FairPoint's covenant obligations, as revised, have been adjusted downward by a range of 0.5x to 1.25x based upon the Credit Agreement definition of EBITDAR in order to provide FairPoint with cushion to successfully operate in this competitive market. The Forecast results measured against the amended covenants demonstrate that FairPoint is expected to remain in compliance with the amended post-exit Credit Agreement covenant obligations throughout the Forecast period.

Another significant revision to the post-exit Credit Agreement pertains to the amortization schedule. As revised, the post-exit Credit Agreement will not require a scheduled principal reduction of the long term, secured debt during fiscal year 2011. Fiscal year 2012 amortization of $10.0 million remains the same as originally contained in the post-exit Credit

Agreement. Fiscal year 2013 amortization has been reduced to $10.0 million from $50.0 million and fiscal year 2014 amortization has been reduced to $25.0 million from $150.0 million. Notwithstanding the balance due in 2015, FairPoint intends to manage the debt and work with its financial advisors to determine the appropriate time to refinance the long term, secured debt facility. These revisions to the post-exit Credit Agreement afford FairPoint with additional liquidity to run the business and respond to evolving market conditions.

3. The indirect acquisition of FairPoint Parent's common stock by Silver Oak will promote the public good.

Under Vermont law, no entity or person may acquire a direct or indirect "controlling interest" in a company subject to the jurisdiction of the Board without prior Board approval.[17] A "controlling interest" is defined as "...ten percent or more of the outstanding voting securities of a [regulated] company; or such other interest as the...[B]oard determines...to constitute the means to direct or cause the direction of the management or policies of a company."[18] The overall standard for evaluating such a transaction is whether the acquisition promotes the general good of Vermont.[19]

The Board should evaluate Silver Oak's proposed interest in FairPoint in light of FairPoint's anticipated corporate governance structure and the overall benefits afforded to Vermont through the reorganization of FairPoint. As explained in the Prefiled Testimony, Silver Oak is a Delaware limited liability company that currently serves as the nominee for holdings of FairPoint secured debt on behalf of investment funds managed by Angelo, Gordon & Co., L.P. ("Angelo Gordon"). As a result of the secured debt Silver Oak holds in FairPoint, these funds

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17 30 V.S.A § 107.

18 *Id.* at § 107(e)(1).

19 *See* June Order at 18, citing 30 V.S.A. § 107(b).

are expected to hold collectively approximately [15%] of the common stock of FairPoint Parent on the Effective Date. Silver Oak will not acquire FairPoint Parent's common stock as a typical investor in a publicly traded corporation. Rather, Silver Oak has acquired an interest in FairPoint Parent's prepetition secured debt. As a consequence of the implementation of the Plan of Reorganization on the Effective Date, all existing equity interests in FairPoint Parent will be cancelled and extinguished, and new common stock of FairPoint Parent will be issued to FairPoint Parent's secured and unsecured creditors.

As indicated in the Prefiled Testimony, Silver Oak is the nominee for holdings of approximately $360 million in aggregate principal amount of the total of $2.1 billion in, or approximately 17% percent of, the secured debt of FairPoint Parent. Thus, assuming for purposes of this calculation that there is no further trading by Silver Oak in FairPoint Parent's secured debt, Silver Oak's secured debt interest, when multiplied by the amount of new common stock to be distributed to secured debt holders pursuant to the Plan of Reorganization, represents approximately 15% of FairPoint Parent's new common stock.

Silver Oak has two members, John M. Angelo and Michael L. Gordon, both of whom also are principals of Angelo Gordon, a privately-held registered investment adviser founded in 1988 that currently has approximately $23 billion in assets under management. Silver Oak functions as the nominee and record holder on behalf of certain investment funds that are beneficial owners of FairPoint Parent's secured debt and will hold FairPoint equity after the Effective Date; these funds, like their nominee, Silver Oak, ultimately are controlled by Mr. Angelo and Mr. Gordon. Angelo Gordon directs all investment decisions and exercises all voting rights on behalf of the investment funds for which Silver Oak acts as nominee. No other entity has an ownership interest in Silver Oak that would make it an indirect owner of ten percent

or more of the voting securities of FairPoint Parent.[20] The Prefiled Testimony contains additional information concerning Silver Oak, its affiliates and its management.

While the totality of the evidence presented should be sufficient to secure the Board's approval of the indirect change in control, the Joint Petitioners submit that the nature of FairPoint Parent's ownership structure and of its corporate governance structure mitigate the ability of Angelo Gordon from "caus[ing] the direction of the management or policies of a company" as set forth in 30 V.S.A. § 107(e)(1). Specifically, as of October 1, 2010, over 130 entities (representing over 60 distinct financial organizations) held FairPoint Parent's secured debt and, absent further trading, will hold FairPoint Parent's common stock as of the Effective Date. This is in addition to the holders of FairPoint's unsecured debt. This means that, on the Effective Date, there literally will be several hundred owners of FairPoint Parent's common stock, which then will be subject to further changes upon the trading of the stock on a securities exchange.[21] Thus no single equity holder will be in a position to direct FairPoint's management or policies on a day-to-day basis.

With respect to FairPoint Parent's corporate governance, the Plan of Reorganization provides that on its Effective Date, the members of the existing Board of Directors will be deemed to have resigned and the new Board of Directors will be installed.[22] Section 8.6.2 of the Plan of Reorganization requires that the new Board be comprised of eight members, at least one

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20 FairPoint also is not aware of the existence of any shareholder agreement or other arrangement by which stockholders in the reorganized company intend, or will be able, to aggregate their ownership interests in order collectively to exercise control over the company. Furthermore, as is the case with individual investors, a group of stockholders acting collectively with respect to their FairPoint Parent common stock interests may be subject to disclosure and other requirements under federal securities laws and rules.

21 FairPoint is in the process of listing with the New York Stock Exchange (the "NYSE") and also has the option of pursuing a listing with a different exchange, such as the NASDAQ.

22 *See* Section 8.2(a)(v), 8.6.1(a) of the Plan of Reorganization.

of which will be a resident of Northern New England. Section 8.6.4 requires that a supermajority of the directors initially serving on the new Board shall be Independent Directors.[23] Aside from FairPoint's CEO and one representative nominated by the unsecured lenders, the new Board is nominated by the Lender Steering Committee, of which Angelo Gordon is a single member. Pursuant to FairPoint Parent's Amended Certificate of Incorporation, after the initial term of the new Board, all of the Board members need to be approved by the then existing stockholders on an annual basis.[24] In other words, within a little over a year of emergence from bankruptcy, FairPoint Parent's stockholders will vote upon a slate of directors.

Moreover, it is the Board of Directors, not the stockholders, of a public corporation that manages the conduct of the corporation. The Amended Certificate of Incorporation specifies that "...the business and affairs of the corporation shall be managed by or under the direction of the Board of Directors..."[25] Under the Corporate Governance Standards of the NYSE, on which FairPoint plans to trade, a majority of FairPoint's directors must be independent. Under FairPoint's Plan of Reorganization, a supermajority of FairPoint's directors must be independent. Pursuant to the NYSE's Corporate Governance Standards, the Board must assess each independent director's relationship with the company and make a determination that the director has no material relationship with the company. FairPoint, as with all NYSE listed companies, must disclose these independence determinations. As noted in the commentary to the NYSE's standards on corporate governance: (i) effective Boards of Directors exercise independent judgment in carrying out their responsibilities and (ii) requiring a majority of independent

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23 *See also* Exhibit F to Joint Plan of Reorganization at § 4.4; [Giammarino] Hood pf. at 26.

24 *See* Exhibit FRP.AS.4 at § 8(d) at 6.

25 *See* Exhibit FRP.AS.4 at § 8(a) at 5.

directors will increase the quality of Board oversight and lessen the possibility of damaging conflicts of interest.[26] This limitation in combination with the annual voting of Directors should mitigate any concern that Angelo Gordon may have the ability to directly control the management or policies of the regulated FairPoint entities.

The Maine Public Utilities Commission (the "Maine Commission") and the New Hampshire Public Utilities Commission (the "NH Commission") recognized the benefits of the change of control of FairPoint and did not express any concern with the company's anticipated ownership structure or governance.[27] A majority of the Maine Commission, for instance, held in relevant part that "...the conclusion of the bankruptcy proceeding, under which a substantial portion of FairPoint's debt will be eliminated, appears to be in (and certainly not contrary to) the interest of ratepayers and shareholders. We therefore approve the...reorganization..."[28] The NH Commission made similar findings, holding in relevant part that "...the facts of this reorganization, in large part the $1.7 billion reduction in the company's debt burden, support a finding that [the] reorganization will have no adverse effect. Accordingly, we find that, subject to the terms of this Order, the change of control is reasonable and in the public interest."[29] The Joint Petitioners urge the Board to likewise rule that the reorganization and any associated change in control is for the public good.

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26 *See* Final NYSE Corporate Governance Standards, p. 4 (at http://www.nyse.com/pdfs/finalcorpgovrules.pdf).

27 *See* Vermont Rules of Evidence 201 (c) and (f), and 3 V.S.A. § 810(4).

28 *See* Maine Reorganization Order at 11.

29 *See* NH Order at 67.

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III. ADDITIONAL CONDITIONS WILL NOT PROMOTE THE PUBLIC GOOD

The evidence in this Docket demonstrates that FairPoint has made operational progress through management changes and short, intermediate and long term process and systems initiatives, including completion of its Customer Delivery Improvement Program ("CDIP") and work on its IT Roadmap, to correct post-cutover issues and improve service to customers. Given the progress that FairPoint has made in addressing service quality issues, and the manifest benefits to Vermont of a deleveraged telephone utility willing to recommit to deploying broadband services widely within its service territory, FairPoint submits that the Board should not risk losing the balanced and well-supported Regulatory Settlement and Plan of Reorganization by imposing conditions beyond the express terms of the Regulatory Settlement in this Docket.

As clearly demonstrated through the present submissions, the reduced financial obligations under the Plan of Reorganization and the revised post-exit Credit Agreement will provide FairPoint with substantial flexibility in its ability to compete and provide advanced, quality services to its customers. At the same time, the Regulatory Settlement and Plan of Reorganization as filed preserve nearly all of the conditions and capital expenditure commitments required by the Board in the Order and CPGs issued in Docket No. 7270, and provide a strong basis for FairPoint to emerge from bankruptcy with the ability to meet its Vermont obligations going forward.

The terms of the Regulatory Settlement, without conditions, are fair and reasonable and promote the general good of the State of Vermont. The improvements in service quality since cutover demonstrate that FairPoint's service is stable and has reached in many instances, and

continues in other areas to approach, pre-cutover levels of service.[30] Indeed, Charles King of Liberty Consulting testified that the achievements FairPoint has made are sustainable because these improvements are the result of the underlying systems and processes having been fixed.[31] The overall assessment of the Department's expert, Curtis Mills, was that based on the progress FairPoint made through the Spring of 2010 the company has in place a reasonable approach and plans to address remaining service quality concerns.[32] Mr. Mills further recognized that it is not necessary to impose additional service quality conditions on FairPoint in this Docket, and that the need for the conditions he discussed (that are not set forth within the Regulatory Settlement) can be examined in greater detail once FairPoint has emerged from Chapter 11 bankruptcy protection and FairPoint's CDIP and related customer-service initiatives have been assessed.[33]

In contrast to the preservation of the overwhelming majority of the regulatory conditions ordered by the Board in Docket No. 7270 and the other benefits of the carefully crafted and balanced Regulatory Settlement, the consequences of rejecting FairPoint's petition or attaching additional conditions include delay and "the unknown outcomes of a protracted legal challenge in bankruptcy court."[34] The addition of conditions by the Board could jeopardize FairPoint's prompt emergence from Chapter 11 bankruptcy protection along with the many benefits attendant with the Plan of Reorganization. Indeed, such conditions would trigger the "most-favored-nation clause" in the other states' carefully balanced and supported regulatory

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30 Reference is made to the final Liberty Consulting Report filed with this Board in Docket 7270 on October 7, 2010.

31 Tr. 5/12/10 at 24-25 (King).

32 Tr. 5/11/10 at 164 (Mills).

33 Tr. 5/11/10 at 134-35 (Mills).

34 *See* O'Brien pf. at 5.

settlements, magnifying the impact of such conditions (and the cost) to FairPoint.[35] More specifically, conditions imposed by the Board would need to be offered to the other states; the costs associated with any Vermont conditions therefore would, as a practical matter, be subject to a multiplier of three, thus forcing the company to seek recourse in the bankruptcy court.

In the event the matter is returned to the Bankruptcy Court, there is substantial risk that the Chapter 11 bankruptcy proceeding will be prolonged, and the litigated result will not be as favorable to Vermont wholesale, retail business and residential consumer interests as the Regulatory Settlement and the numerous merger conditions and benefits preserved therewith.[36] In the event further litigation ensues in the Bankruptcy Court, it is reasonable to expect FairPoint, its secured lenders and other creditors to seek more substantial relief from the Vermont merger regulatory conditions than the more limited relief sought in the Regulatory Settlement. Such a result, and further delay in FairPoint's emergence from Chapter 11 bankruptcy under what FairPoint believes to be a reasonable and balanced plan, is not in the best interests of the state of Vermont and its consumers.

The NH Commission recognized in its Order approving the New Hampshire Regulatory Settlement and other transactions related to the bankruptcy reorganization that: "...a fair and quick resolution of the bankruptcy proceeding is in the best interests of customers. An extended proceeding will add to the costs of administration and continued jurisdictional uncertainties in a way that benefits no one"[37] The NH Commission and the Maine Commission did not order

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35 Each of the Maine and New Hampshire Commissions has approved without conditions the respective regulatory settlements proposed by FairPoint and the Commissions' staffs. Each of those regulatory settlements contains a clause similar to Section 4.5 of the Vermont Regulatory Settlement (*i.e.*, the "most-favored-nation clause").

36 *See* O'Brien pf. at 6.

37 DT 10-025, Order No. 25, 129 of NH PUC of 7/7/10 at 77.

additional conditions recommended by CLEC and other parties outside of the New Hampshire Regulatory Settlement.[38] Both the NH Commission and the Maine Commission essentially held that they would not as part of the bankruptcy reorganization-related proceeding make determinations on the proposed CLEC conditions and that any such issues if raised could be reviewed in the normal course of regulatory matters after FairPoint emerges from bankruptcy.[39] This Board similarly should decline to order additional conditions originally recommended by Mr. Mills and by CLECs in this Docket.

As previously explained, FairPoint's creditors have made substantial concessions by collectively reducing the company's debt obligations by approximately $1.7 billion in exchange for equity. FairPoint's secured lenders, for their part, agreed to revise the post-exit Credit Agreement to reflect the challenging competitive environment that FairPoint is facing and with which it will need to contend when it emerges from Chapter 11. Every constituency that has been affected by FairPoint's Chapter 11 filing has made concessions. And no entity—least of all FairPoint—has emerged from this experience with its initial expectations satisfied. But that, in essence, is the point of Chapter 11. It is intended to facilitate the orderly restructuring of the debtor's liabilities and assets so as to provide the debtor with a fresh start.[40]

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38 DT 10-025, Order No. 25, 129 of NH PUC of 7/7/10 at 74 and the Maine Commission's Reorganization Order at 18-19.

39 DT 10-025, Order No. 25, 129 of NH PUC of 7/7/10 at 73-74 and the Maine Commission's Reorganization Order at 18-19.

40 *See* 1 COLLIER ON BANKRUPTCY ¶ 1.01[1] (16th ed. 2010) (citing *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007), among others, for the following proposition:

> The Supreme Court has long and often stated that "[t]he principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." For businesses, the Code allows reorganization. In reorganization, businesses can take advantage of the Code's provisions that permit debts, both secured and unsecured debts, as well as equity interests, to be restructured).

REDACTED

The citizens of Vermont will benefit from FairPoint's fresh start. Indeed, the commitments FairPoint has affirmed through the Regulatory Settlement will provide the citizens of Vermont with far more than they may have received had FairPoint sought to reject those commitments in the Bankruptcy Court. The Board should recognize the progress FairPoint has made—and expects to continue to make—in Vermont and minimize any threat to that progress by approving the requests set forth in the Second Amended Petition without imposing any additional conditions on the company.

IV. CONCLUSION

FairPoint has addressed the concerns expressed by the Board in its June Order. The Board should issue the approvals requested by FairPoint in this Docket without imposing conditions that will jeopardize FairPoint's Plan of Reorganization.

The Joint Petitioners request that the Board immediately issue a notice establishing a date for a status conference and a date for a hearing (if necessary). The Joint Petitioners also request that the Board establish a procedural schedule consistent with this Motion. Discovery should be undertaken in an efficient manner and should be limited to an evidentiary workshop, with the Board's participation, to be held as soon as possible. FairPoint requests that any further regulatory proceedings, including the issuance of a final order, be concluded by November 23, 2010. The clearly-expressed intention of the Board to consider in an expedited manner a revised submission that addresses its concerns is warranted under the present circumstances.[41]

See also Rederford v. US Airways, Inc., 589 F.3d 30, 36 (1st. Cir. 2009) ("Chapter 11 reorganization provides debtors with a fresh start by adjudicating, disallowing, or discharging all claims arising before the debtor is discharged from bankruptcy.")

41 *See* June Order at 95; 3 V.S.A. § 809(a); *Petition of Twenty-Four Vermont Utilities*, 159 Vt. 363, 369 (1992) (one business day notice of evidentiary hearing was reasonable under the circumstances).

REDACTED

For all of the above reasons, the Board should grant all of the requested approvals as contained within the Second Amended Petition promptly and without conditions.

October 20, 2010, Respectfully submitted,

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