

**STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION  
DT 11-061  
FairPoint Communications, Inc. Petition for  
Approval of Simplified Metrics Plan and Wholesale Performance**

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**OPPOSITION TO MOTION FOR RECONSIDERATION**

The CLECs (CTC Communications Corp., Choice One of New Hampshire Inc., Lightship Telecom, LLC and Conversent Communications of New Hampshire LLC, all d/b/a EarthLink Business, Freedom Ring Communications LLC d/b/a BayRing Communications; Biddeford Internet Corporation, d/b/a Great Works Internet; CRC Communications LLC d/b/a/ OTT Communications; and National Mobile Communications Corporation d/b/a Sovernet Communications) submit this Brief in Opposition to the Motion for Rehearing, Reconsideration or Clarification of Order No. 25,623 (“Motion”) filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) on February 19, 2014.

**I. INTRODUCTION**

In its Motion, FairPoint asks the Commission to make significant changes to its earlier decision on the Late and Inaccurate Report (“LIR”) section of the Wholesale Performance Plan (“WPP or Plan”), as well as changes to the Commission’s contract waiver decision. The CLECs urge the Commission to reject, in full, FairPoint’s request relating to the LIR section of the WPP. As will be discussed more fully below, FairPoint’s Motion fails to meet the standard for reconsideration because the issues were thoroughly briefed and considered by the Commission in a decision that appropriately balanced the interests of all parties. With regard to FairPoint’s position on the contract waiver of WPP penalties, the CLECs note that there may have been a minor misunderstanding concerning the structure the parties had already agreed to, in that only

penalties actually paid to CLECs would count toward the penalty cap. However, we disagree with FairPoint's proposed remedy and instead, as explained below, request that the Commission include language in the WPP prohibiting the waiver of WPP penalties in contracts for unregulated services.

**II. FAIRPOINT'S MOTION FOR RECONSIDERATION REGARDING LATE AND INACCURATE REPORTS RAISES NO ERRORS OR LAW OR FACT AND SHOULD BE DENIED.**

**A. FairPoint's Motion Does Not Meet the Standard for Reconsideration.**

The Commission's Order appropriately analyzed and resolved the open issues relating to late and inaccurate reporting, adopting the recommendation of Staff. The Commission specifically established the per diem penalty for late reports, added an incentive for FairPoint to monitor and correct reporting inaccuracies in a timely manner, and addressed the situation where a FairPoint reporting error resulted in the need to reduce future bill credits to Competitive Carriers to offset such a FairPoint error.

As noted by FairPoint itself, the Commission may only grant such rehearing if "in its opinion good reason for the rehearing is stated in the motion." FairPoint Motion, at 2, citing RSA 541:3. FairPoint correctly notes that the purpose of rehearing is to correct matters "either overlooked or mistakenly conceived" and that "to prevail on a motion for rehearing" FairPoint would have to demonstrate that the Commission's order is "unlawful or unreasonable." FairPoint Motion at 2. The FairPoint Motion plainly fails to meet any of these standards, and thus fails to merit any consideration.

Indeed, the FairPoint Motion offers no support or evidence indicating that the Commission did not duly consider the issues or that the Order is in any way "unlawful or unreasonable. Rather, FairPoint is clearly attempting to re-argue points already argued and

decided. As a result, the Commission should simply deny the FairPoint Motion, clarify the issues as noted below, and reaffirm the directive that the parties work together in a timely fashion to finalize the wording for this section of the Plan.

**B. FairPoint Failed to Show That Issues Relating to Late Reporting Were Overlooked or That the Commission’s Determinations Were Unlawful or Unreasonable.**

The underlying premise of the Plan is that FairPoint will timely (and accurately) report its performance on a monthly basis. If FairPoint fails in that regard, it will be subject to a penalty – the intent of which is to properly incentivize rather than to penalize. In recognition of that intent, the Commission (a) adopted *FairPoint’s* per-State penalty figure, and (b) added a provision to ensure that the overall (*i.e.*, three-State) penalty was large enough to incentivize timely reporting.

FairPoint’s Motion is largely an exercise in obfuscation, suggesting three “examples” that purport to show the administrative difficulty in implementing the Commission’s determination, absurdly suggesting that the Commission would impose penalties in NH when only other states (Maine or Vermont) reports are late. FairPoint completely ignores the fact that the Commission directed the parties to work together to propose specific wording to implement the Commissions’ modifications. If FairPoint would have chosen to work with the CLECs and Comcast Telephone of New Hampshire (“Comcast”) (collectively with the CLECs, the “Competitive Carriers”), the parties would have easily clarified and disposed of FairPoint’s concerns. Indeed, prior to the FairPoint Motion, the Competitive Carriers proposed adding the following language to the late reporting section of the Plan to effectuate the Commission Order:

If the total per day penalty from all three states is less than \$750 a day, then the penalty for late reports [filed in New Hampshire] shall be the greater of: (a)\$250 or (b)\$750 less the per day penalties for Maine and Vermont [regardless if the reports in Maine and Vermont are late in the same reporting month].

This additional language clarification should eliminate FairPoint's concerns with the Commission's modifications; however, the Competitive Carriers stand ready to review such language with FairPoint.

Should the Commission determine that a more simplified approach is warranted, the CLECs recommend that the Commission simply adopt the Competitive Carriers' proposed penalty of \$500.00, as this would ensure the penalty is high enough to deter the filing of late reports in New Hampshire, regardless of how Maine and Vermont rule on this specific issue.

FairPoint also asserts that the Commission did not address two requirements proposed in FairPoint's additional late reporting provisions: (a) notification of late reports within three days; and (b) force majeure events. FairPoint provided no support for these proposals, asserting erroneously that Staff and the Commission did not fully review the proposals. Despite FairPoint's claim, the Commission's Order does reference the CLEC notification issue. "Pursuant to FairPoint's proposal, Competitive Carriers would be required to notify FairPoint within three days if FairPoint posts its report late, and CLECs would have the burden of showing reports were inaccurate based on objective information available to both parties." Order at p. 11. Therefore, the Commission was well aware of FairPoint suggestion and the burden FairPoint would impose on CLECs; it chose not impose it.

Force majeure events are already addressed within the Plan, at Section G. Given that the Commission, in the same Order, approved all of the non-contested sections of the Plan in their entirety, the Commission was certainly aware that force majeure issues were already

addressed and saw no need to add redundant or potentially conflicting language in the late reporting section.

Thus, FairPoint has failed to show that any issues were overlooked or mistakenly conceived or that the Commission's determinations were unlawful or unreasonable. Accordingly, the Commission should confirm its determinations on the late reporting provisions of the Plan and deny FairPoint's Motion on these issues.

**C. FairPoint's Arguments Concerning Inaccurate Reports Are Not Only Erroneous But Also Fail to Meet the Standard For Reconsideration and Should Be Dismissed.**

FairPoint also seeks reconsideration on the inaccurate reporting section of the Plan and, similar to its arguments on the late reporting section, fails to provide evidence that the Commission committed any error of law or fact. Instead, FairPoint asserts that the Commission failed to rule on certain portions of the Competitive Carriers' proposal because the Commission did not specifically comment on certain wording. FairPoint shamelessly argues that the Commission focused only on the dollar "penalty" section of the Competitive Carriers' proposal. However, even a cursory review of the Commission's Order reveals that it adopted the Staff proposal, which adopted the Competitive Carriers' proposal with two minor modifications:

"With respect to inaccurate reporting penalties, the Commission adopts the Competitive Carriers' proposal for inaccurate reporting penalties in order to assure the reported data is accurate, and directs FairPoint and the other Joint Movants to develop specific language for inclusion in the WPP to effect these penalty provisions, with two modifications."

Order at p. 24.

FairPoint argues that the Commission's inclusion of the word "penalties" at the end of the statement "the Commission adopts the Competitive Carriers' proposal for inaccurate

reporting penalties” meant that the Commission just ignored any other provisions in the Competitive Carriers’ proposal because those provisions were not related to the penalties of inaccurate reporting. FairPoint’s rationalization is patently absurd. The Commission clearly understood that it needed to pick one of the two overall approaches suggested by the parties and modify any provisions it deemed necessary. That is exactly what it did, stating: “The Commission adopts the Competitive Carriers’ proposal for inaccurate reporting...with two modifications.”

FairPoint’s claims reflect either a bald-faced attempt to re-litigate matters or a failure to fully read the CLECs’ proposal. FairPoint claims the Competitive Carriers proposed a “daily penalty of \$500 per state” for inaccurate reports; this is simply incorrect. The Competitive Carriers’ proposal reflects a 15% penalty or a simple interest penalty, all of which was fully discussed in the Staff recommendation. The substantive arguments FairPoint makes were vetted in parties’ briefs and, as such, should be dismissed. The Commission should confirm its original ruling regarding inaccurate reporting and demand that the parties work together to clarify the wording for the two modifications that the Commission clearly directed the parties to review.

The Commission should squarely reject FairPoint’s self-serving claim that “the CLEC proposal for audits and penalty exposure is not an incentive program, but a draconian self-enrichment arrangement for Competitive Carriers, an abdication of their duties of diligence, and an abrogation of the settled WPP regarding audit provisions.” FairPoint claims that certain portions of the Commission ordered plan “is orders of magnitude beyond what is lawful and reasonable,” however FairPoint offers no additional evidence to support their assertion – because there is none. The portion of the Competitive Carriers’ proposal that FairPoint

laments are only triggered when “FairPoint cannot revise a monthly report to correct a material error, due to an issue within FairPoint’s control such as maintaining accurate source data.” By arguing that these provisions are “draconian,” FairPoint makes a thinly veiled attempt to eliminate its responsibility to maintain proper performance metric records – a responsibility that the Liberty’s audit report clearly found FairPoint failed to meet.

Finally, the Commission should completely disregard FairPoint’s patently erroneous and revisionist arguments regarding the audit provisions of the WPP. Without revealing the details of the parties’ negotiations, suffice it to say that FairPoint was fully aware that the CLECs considered the audit provisions relating to inaccurate reporting (which are much more limited than those contained in Section I of the Plan) a disputed issue that would be included in the CLECs’ inaccurate reporting proposal. Despite such knowledge, FairPoint never indicated to the CLECs that it believe their position to be a violation of the settlement agreement – because, once again, it is not.

In summary, the Commission’s Order regarding late and inaccurate reporting was, in fact, a clear statement of the Commission’s choice to adopt the Competitive Carriers’ proposal with three simple modifications. FairPoint’s motion fails to meet the standard for reconsiderations and seeks only to re-litigate settled matters; as such, it should be dismissed by the Commission. The Commission should order the parties to finalize the late and inaccurate provisions of the WPP consistent with the Competitive Carriers’ proposal, subject to the three Commission-ordered modifications.

### **III. THE COMMISSION HAS JURISDICTION TO OVERSEE THE WPP AND, PURSUANT TO THAT JURISDICTION, CAN AND SHOULD PROHIBIT WAIVER OF WPP CREDITS IN COMMERCIAL AGREEMENTS FOR UNREGULATED SERVICES**

Section F of the proposed WPP submitted by the parties last October states that, “The cap will encompass only those bill credits actually posted to CLEC BANS for missed performance (including escalators).” This provision reflects the parties’ intention that any WPP credits subject to waiver through commercial agreements, and thus never actually paid by FairPoint, would not count towards the annual cap on WPP credits. From the CLECs’ perspective, such a provision was an improvement on the existing PAP under which both those PAP credits actually paid, as well as those waived, count toward the annual cap. (Up to 50% of credits “paid” under the existing PAP were, in fact, never actually paid to a CLEC because of the waivers.)

The question addressed in the parties’ briefs on unresolved issues was whether the Commission should insert language into the WPP prohibiting the waiver of WPP penalties in commercial contracts for unregulated services. The CLECs argued that allowing FairPoint to require the waiver of WPP penalties related to wholesale services subject to both state and federal jurisdiction in order to obtain non-regulated services fundamentally undermines both the purposes and execution of the WPP. The Commission’s decision to require FairPoint to pay waived penalties into a state fund addresses part of the CLECs’ concerns but does not go far enough – it does not address the fact that FairPoint will be allowed to continue exacting waivers of penalties on regulated services in contracts for non-regulated services.

If, as FairPoint alleges in footnote 7 of its Motion, broadband services are not subject to regulation, then FairPoint should not be allowed to require waiver of penalties associated with regulated services in order to access those services. FairPoint wants to have its cake and eat it too: it wants to be free of both regulation on certain services and any downside associated with

its regulated offerings. If FairPoint wants commercial agreements that address non-regulated services to remain free of Commission oversight, then it must stop requiring that such agreements include terms and conditions that waive or otherwise alter FairPoint's regulatory obligations with regard to regulated services, including WPP penalties.

FairPoint's claim that the Commission has no jurisdiction over its contracts is a red herring. The Commission does not need jurisdiction over FairPoint's contracts. What it needs, and already has, is oversight of the enforcement of the WPP. *See Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the New Hampshire and Delaware*, CC Docket No. 02-157, Order, at ¶ 171 (Sept. 25, 2002) (NH 271 Order). ("We find that these PAPs, together with our section 271(b)(6) authority and the continuing oversight of the respective state commissions, provide reasonable assurance that the local market will remain open after 271 authority is granted.") The proper functioning of the WPP is most certainly within this Commission's jurisdiction. A WPP which allows FairPoint to avoid the penalties it willingly assumed in order to gain entry into the long distance market turns the purpose of a WPP or PAP on its head. Penalties for services required by section 251 and 271 that are measured under the WPP are not, by definition, avoidable by FairPoint.

In summary, WPP penalty avoidance through waivers found in unrelated commercial agreements is inconsistent with the effective operation of a PAP, and most especially with this particular WPP. The Commission can, and should, modify the WPP by including language making clear that bill credits cannot be avoided or waived. This change, along with a clarifying

language adopting the WPP as proposed by the parties will ensure that FairPoint is provided the proper incentives related to wholesale services required by the TelAct.

#### IV. CONCLUSION

For the reasons explain above, the CLECs respectfully request that the Commission deny FairPoint's Motion in full, re-affirm its findings on late and inaccurate reporting penalties, and modify its decision on WPP waivers to be consistent with the parties' intent and to include language prohibiting waiver of WPP penalties.

FREEDOM RING COMMUNICATIONS d/b/a  
BAYRING COMMUNICATIONS

CTC COMMUNICATIONS CORP.,  
LIGHTSHIP TELECOM LLC, CHOICE ONE  
OF NEW HAMPSHIRE INC., and  
CONVERSENT COMMUNICATIONS OF NEW  
HAMPSHIRE LLC , all d/b/a EARTHLINK  
BUSINESS

BIDDEFORD INTERNET CORPORATION  
d/b/a GREAT WORKS INTERNET

CRC COMMUNICATIONS LLC d/b/a OTT  
COMMUNICATIONS

NATIONAL MOBILE COMMUNICATIONS  
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Dated: March 4, 2014

By: Trina M. Bragdon

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Brief.)

## CERTIFICATE OF SERVICE

I, Trina Bragdon, hereby certify that copies of the Opposition to Motion for Reconsideration were delivered via Hand Delivery to the Commission and via e-mail to the parties on the Commission's electronic service list on this 4<sup>th</sup> day of December, 2014.

Trina M. Bragdon  
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