

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 11-061

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC d/b/a
FAIRPOINT COMMUNICATIONS – NNE**

**Petition for Approval of Simplified
Metrics Plan and Wholesale Performance Plan**

Order Approving Wholesale Performance Plan and Resolving Outstanding Issues

ORDER NO. 25,623

January 24, 2014

I. PROCEDURAL HISTORY

On October 11, 2013, a Joint Motion for Approval of Wholesale Performance Plan Stipulation and Settlement Agreement (Joint Motion) was filed by Northern New England Telephone Operations, LLC d/b/a FairPoint Communications NNE (FairPoint), Comcast Phone of New Hampshire LLC (Comcast), and by the following carriers: 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; 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 (Competitive Carriers). FairPoint, Comcast, and the Competitive Carriers are referred to collectively as the Joint Movants.

The Joint Motion seeks Commission approval of a new Wholesale Performance Plan (WPP) to replace the existing Performance Assurance Plan (PAP) and its underlying Carrier to Carrier wholesale service quality assurance plans, originally developed by Verizon and adopted by FairPoint in connection with its acquisition of certain telecommunications assets in Northern

New England. In addition, the Joint Motion resolves issues consolidated into the instant docket from Docket Nos. DT 09-059 and DT 09-113.¹ Following a series of workshops, conferences and extensive negotiations, the Joint Movants developed the WPP and filed it for approval in each of the three states, noting their failure to resolve three outstanding issues and asking that the Commission receive briefs regarding these issues and render a decision resolving them. The three outstanding issues involve (i) terms and penalties for late or inaccurate monthly reports, (ii) change in law provisions, and (iii) commercial contract provisions that waive WPP bill credits. The Joint Movants specifically requested that discovery be waived or strictly limited, and that no hearing be conducted before the Commission, in connection with Commission review and evaluation of the WPP Stipulation and Settlement Agreement.

By secretarial letter dated October 18, 2013, the Commission set a procedural schedule for this proceeding that did not provide for discovery or hearings, but required the submission of initial and reply briefs regarding the three outstanding issues, as requested by the Joint Movants, and also set deadlines for parties in the docket which did not join in the filing of the Joint Motion to comment on or object to the Joint Motion and the WPP and to respond to the briefs filed by any of the Joint Movants. No other filings were received.

Initial briefs regarding the three outstanding issues were filed by FairPoint and the Competitive Carriers on November 8, 2013. On November 25, 2013, the Competitive Carriers requested an extension of the deadline to file reply briefs from November 26, 2013 to December 3, 2013, and the Commission granted this request by secretarial letter dated November 27, 2013.

¹ In Docket No. DT 09-059, FairPoint requested a permanent waiver from certain metrics required by the PAP which FairPoint's systems could not record, and a temporary waiver from other metrics which FairPoint's systems failed to record during cutover. BayRing objected to the request for waiver. Docket No. DT 09-113 was a request by FairPoint to reduce the dollars at risk under the PAP.

On December 3, 2013, reply briefs were filed by FairPoint, by Comcast, and by the Competitive Carriers.

On January 6, 2014, Staff filed a memorandum summarizing key provisions of the WPP, describing the three unresolved issues, and recommending Commission approval of the WPP and Commission resolution of the three outstanding issues in contention; this memorandum was revised to correct one paragraph on January 7, 2014 (as revised, Staff Memo).

II. SUMMARY OF WHOLESALE PERFORMANCE PLAN

The Staff Memo summarized the WPP as follows. The new WPP is designed to measure FairPoint's performance in providing federally-mandated wholesale services to competitive local exchange carriers (CLECs)² and to provide for penalties payable to CLECs as FairPoint's wholesale customers if it fails to meet the specified performance standards.³ The WPP puts \$12 million per year at risk as an incentive for FairPoint to provide the agreed-upon levels of wholesale service. Of this total amount, \$4.75 million per year is at risk in each of New Hampshire and Maine and \$2.5 million is at risk in Vermont. The WPP contains numerous "metrics," a term of art referring to measurements of the quality or timeliness of FairPoint's performance of individual tasks undertaken to enable interconnection with other carriers. The actual results achieved are then compared to the specified numerical standards for performance of such tasks; metrics are thus measures of FairPoint's service performance in specific interactions with CLECs.

² The term "competitive local exchange carrier" is no longer a primary designation under state law, having been replaced by the term "excepted local exchange carrier," as defined in RSA 362:7, I (c). The term remains widely used in the federal regulatory context however, such as with respect to the intercarrier obligations that are the subject of the PAP and the proposed WPP. In this Order, the term CLEC is used to refer to competitive local exchange carriers to which the WPP applies.

³ This summary is intended to provide an overall summary of the WPP, including some detail regarding certain key provisions, but does not cover all of the WPP provisions.

Certain of the metrics specified in the WPP are compared to FairPoint's retail service performance to ensure parity and other metrics are compared to benchmarks representing specified performance expectations. Seventy-seven of the WPP metrics are measured against benchmarks, and fifty-five are compared against FairPoint's retail performance. Each of these metrics is scored as "met" or "missed" each month both at the aggregate level, for service to all CLECs in a state, and at the individual CLEC level. Generally, when the metric is scored as a "miss," FairPoint will issue bill credits for those transactions. Eighty-five additional metrics are reported under the WPP for tracking and diagnostic purposes.

1. Determining Performance; Parity and Benchmarks

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

Benchmark metrics are compared to specified performance expectations, often expressed as a percentage. Performance for benchmark metrics is scored as "met" or "miss" by comparison to the defined benchmark. When the sample of wholesale occurrences for a benchmark metric is so small that FairPoint's performance would have to be perfect to avoid paying a penalty, the report will indicate "SS" for small sample. The WPP specifies the number

of occurrences which constitute a small sample for each relevant metric. When a small sample is detected, at least two occurrences must fail to meet the standard for the report to reflect a “miss” and generate a penalty.

2. Bill Credits/Penalties

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

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

Other potential bill credits are applied on a “per metric” basis, and have a specified dollar amount per transaction credited for each “eligible” transaction where performance is missed. If the CLEC aggregate is a miss, then CLECs which received performance worse than the standard would receive bill credits and the small sample rules would not apply at the individual CLEC level. If the CLEC aggregate is met, then CLECs which received performance worse than the

standard, after application of applicable statistical tests and the small sample rules, would be issued bill credits. In the event performance for an individual CLEC subject to applicable statistical tests and the small sample rules is substandard for two consecutive months, but the CLEC aggregate performance has met the standard, then an individual CLEC would have the right to request that FairPoint conduct a detailed review of its performance relative to that CLEC.

The WPP provides for an escalation of penalties for repeated failures to meet the defined performance standards. For pre-ordering, ordering and network performance, bill credits are doubled in the third month of missed performance, and increased by 50% of the base credit in each of the next six consecutive months until the tenth consecutive month of missed performance, at which time the bill credit amount will be capped at five times the base credit until FairPoint's performance meets the standard. Penalties escalate more rapidly for provisioning, maintenance and repair (with one exception) and billing accuracy. Bill credits are doubled in the third consecutive month of missed performance, but increase by 100% of the base credit for the next three months until the penalty is capped at five times the base credit in the sixth consecutive month of missed performance, at which time the bill credit amount will be capped until FairPoint's performance meets the standard. When performance is missed in three of six non-consecutive months, the applicable bill credit is multiplied by 2.5 for the third non-consecutive month.

3. Other WPP Provisions

Within 28 days of the end of each month, FairPoint will produce a performance report and calculate bill credits owed to each CLEC. Any applicable bill credits will be issued within 30 days of the performance report. Bill credits issued to a CLEC under the terms of an

interconnection agreement will reduce penalties owed as a result of the WPP, so that FairPoint will not be required to pay a penalty twice for the same missed metric.

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

Modifications can be proposed for the WPP every two years. Any proposed modification will be subject to approval by the Commission. Administrative changes to the WPP are permitted outside the two-year review window with notice to the CLECs, which will then have an opportunity to petition the Commission for review of any change proposed by FairPoint or proposed by a CLEC but rejected by FairPoint.

FairPoint must retain all data required for an audit for a period of thirty-six months under the WPP. The WPP will be subject to an independent audit no more frequently than every two years at the Commission's discretion, and FairPoint will pay for any such audit. The results of any audit will be shared with CLECs and the other two states, and any modifications and/or corrections based on the results of the audit will be applied across all three states.

The WPP provides it will remain in effect until the Commission issues a final order determining otherwise. As part of the overall resolution of the issues, if the WPP is approved, FairPoint agreed to withdraw its petition in Docket No. DT 09-113 with prejudice, and BayRing agreed to withdraw its objection to FairPoint's request for waiver in Docket No. DT 09-059.

III. POSITIONS OF PARTIES AND STAFF

A. Approval of WPP Stipulation and Settlement Agreement

1. Joint Movants Position

In the Joint Motion, the Joint Movants asserted that the WPP Stipulation and Settlement Agreement “represents many months of concerted, good-faith effort by FairPoint and a strongly represented CLEC community,” facilitated at times by Staff of the Maine and New Hampshire Public Utilities Commissions, and the Vermont Public Service Board and Department of Public Service. Joint Motion at 3. They maintained their agreement resolves most of the key structural components of the new simplified PAP, and they submitted that the WPP Stipulation and Settlement Agreement would produce a result that is just and reasonable and serves the public interest, as required by the Commission’s rules.

The Joint Movants further requested that the Commission approve the WPP Stipulation and Settlement Agreement and resolve the three outstanding issues, after briefing, but without discovery and with no hearing conducted before the Commission. They requested any necessary waiver of the Commission’s procedural rules to effect this streamlined approval process, citing the Commission’s authority to waive its rules if such waiver serves the public interest and will not disrupt the orderly and efficient resolution of matters before the Commission, under N.H. Code Admin. Rule Puc 201.05(a). In support of the proposed procedural process, the Joint Movants noted that all parties in this docket have been aware of the workshops, discussions and proceedings leading to the WPP Agreement and all affected carriers, including those not party to the WPP Agreement, have had the opportunity to participate. Therefore, according to the Joint Movants, the proposed method of handling their settlement would not unduly prejudice any party and would be consistent with the public interest.

In the Stipulation and Settlement Agreement itself, the Joint Movants provide for the resolution of any and all open issues in two related Commission proceedings, Docket No. 09-113 and Docket No. DT 09-059.

2. Staff's Recommendation

In the Staff Memo, Staff recommended that the Commission approve the proposed WPP filed by the Joint Movants, subject to resolution of the three remaining disputed issues. Staff stated that the proposed WPP appears to strike a reasonable and appropriate balance between the interests of FairPoint and competitive carriers and contains more specific metrics and billing credit penalty provisions than the existing PAP. In Staff's view, the WPP also is self-executing, simplified and more transparent than the existing PAP, in that it contains clearly articulated measures and standards, and the parties' agreed-upon provisions indicate a structure designed to detect and sanction poor performance by FairPoint. Staff concluded that the potential penalty liability agreed to by FairPoint and the other Joint Movants should provide a meaningful and significant incentive to comply with the specified performance standards, so long as FairPoint's potential exposure remains not less than \$4.75 million per year in New Hampshire. With Commission resolution of the outstanding disputes on late and inaccurate reporting, the effect of changes in law, and waiver of potential liability through commercial contracts, the WPP will contain all of the characteristics necessary for an appropriate performance assurance plan, according to Staff.

With respect to resolution of the two related dockets, Staff concluded that, because the Joint Movants had agreed on dollars at risk in the WPP on a prospective basis, the issues consolidated in this proceeding from DT 09-113 would be resolved if the WPP is approved. Staff Memo at 4. In regard to outstanding issues in DT 09-059, Staff expressed its belief that the

temporary waiver associated with the eleven metrics for which data were not collected during cutover is moot as a result of FairPoint's bankruptcy proceeding, and because the Joint Movants have agreed on metrics to be reported in the new WPP, the remaining issues consolidated in this proceeding from the earlier docket should be deemed to be resolved if the opposition is withdrawn pursuant to the terms of the settlement. *Id.*

B. Terms and Penalties for Late or Inaccurate Reporting

1. FairPoint's Position

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

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

Pursuant to FairPoint's proposal, CLECs would be required to notify FairPoint within three days if FairPoint posts its report late, and CLECs would have the burden of showing reports were inaccurate based on objective information available to both parties. FairPoint also proposed a "materiality threshold" (which is not fully explained in its initial brief), and "in the absence of sufficient materiality data," a daily penalty of \$500 per day per state until the reporting error is corrected. FairPoint Initial Brief at 10. Finally, FairPoint recommended the inclusion of a dispute resolution process for late or inaccurate reporting.

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

2. Competitive Carriers' Position

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

With respect to inaccurate reports, the Competitive Carriers proposed that FairPoint have the ongoing responsibility to identify and correct any inaccuracies in its monthly WPP reports,

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

As proposed by the Competitive Carriers, FairPoint would be required to post corrective bill credits for all affected CLECs within thirty days of reissuance of the previously erroneous WPP report; in addition, FairPoint would have to post bill credits equal to the greater of (i) interest on the corrective credits at the interest rate FairPoint charges CLECs for late payments under its wholesale tariffs, or (ii) an inaccuracy penalty of 15% of the corrective credits.

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

The Competitive Carriers further proposed that any CLEC have the right to initiate an independent third-party audit or review, with approval of the Commission or authorized Staff, of FairPoint's data collection, computing, and/or reporting process issues. This audit would be

conducted at the CLEC's expense, provided that, if the audit or review affirms the issue initially presented by the CLEC and denied by FairPoint as one that materially affects reported performance results, then FairPoint would be required to reimburse the CLEC for the costs of the audit or review.

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

In particular, the Competitive Carriers argued that (i) FairPoint should be required to re-issue corrected reports and WPP bill credits, (ii) late reporting penalties should not be limited as proposed by FairPoint, (iii) penalties for inaccurate reporting should reflect the size and scope of FairPoint's errors, (iv) late and inaccurate reporting penalties should not be subject to a separate cap, and (v) any penalties should be paid to the impacted CLECs.

3. Comcast's Position

In its reply brief, Comcast indicated its full support for Commission adoption and incorporation into the WPP of the Competitive Carriers' proposed terms that "promote the timely

and accurate collection and reporting of performance results and posting of bill credits.”

Comcast Reply Brief at 2.

4. Staff's Recommendation

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

C. Change In Law Provisions

1. FairPoint's Position

In its initial brief, FairPoint argued that the WPP should be self-executing and that if FairPoint is no longer required to provide a particular service or network element as a result of a change in law, then that service or element should no longer be subject to the metrics, reporting

or bill credit provisions of the WPP. FairPoint proposed that the WPP contain a change in law section including the following as its second paragraph:

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

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

In its reply brief, FairPoint maintained that its proposed “streamlined” process, criticized by the Competitive Carriers as “unilateral,” would be limited to the discontinuance of products and services (such as unbundled network elements) that are delisted following “extensive due process at the federal level.” FairPoint Reply Brief at 13-14. FairPoint asserted there is no reason to introduce any more process at the state level regarding any such delisted products and services, as proposed by the Competitive Carriers, except to encourage unwarranted delay and thereby “perpetuate the income stream that the WPP represents (especially under the CLEC proposal).” FairPoint Reply Brief at 14.⁴

2. Competitive Carriers’ Position

The Competitive Carriers in their initial brief criticized FairPoint’s proposed language as reserving to itself the unilateral right to modify WPP provisions without regulatory review or

⁴ FairPoint’s reply brief also alleges that the Competitive Carriers have violated the confidentiality of the parties’ settlement discussions with respect to FairPoint’s positions on and proposed language regarding the change in law issue. FairPoint Reply Brief at 12-13.

approval upon a purported change in applicable law. The Competitive Carriers instead proposed that the WPP change in law section include a defined role for the Commission, either to approve agreed-upon revisions or to resolve any differences, based on the following second paragraph language:

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

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

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

3. Comcast's Position

In its reply brief, Comcast expressed full support for Commission adoption and incorporation into the WPP of the Competitive Carriers' proposed change in law provisions that "appropriately account for any changes in law and establish an orderly process for their implementation, with proper Commission oversight." Comcast Reply Brief at 2.

4. Staff's Recommendation

In the Staff Memo, Staff indicated its agreement with the Competitive Carriers' position that any revision of the WPP terms and conditions based on a change in law should be implemented only after review and approval by the Commission. Staff noted it is rare that an order of the Federal Communications Commission (FCC) or a change in law is undisputable. Allowing FairPoint to prohibit opportunity for debate about such a change in law may have an adverse effect on the clearly-articulated, pre-determined measures and standards agreed upon between opposing parties, in Staff's view. Staff acknowledged, however, that FairPoint had raised a valid point that certain legal or regulatory changes may be beyond reasonable contention, such that their immediate implementation would be appropriate. Staff stated that FairPoint's concern may be addressed by permitting revisions to WPP performance metrics and related billing credits to be retroactive to the effective date of the change in law once the revisions have been reviewed and approved by the Commission. This approach would preserve the Commission's oversight of changes to the WPP, in Staff's view, while effectuating the financial impact of any service or product delisting as of the time of the change in law, thereby diminishing any incentive to unnecessarily delay the state regulatory approval process.

D. Waiver of Bill Credits Through Commercial Contracts

1. FairPoint's Position

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

In its reply brief, FairPoint reiterated the position that its commercial contracts are beyond the scope of the Commission’s jurisdiction and should not be considered in this docket. FairPoint also pointed out what it claims are flaws in the Competitive Carriers’ arguments regarding the scope of the potential harm to individual CLECs and the competitive market as a whole. In particular, FairPoint asserted that its “Wholesale Advantage Agreements” would not be relevant because the services provided under these agreements are not the subject of metrics or credits under the new WPP. FairPoint Reply Brief at 15-16. FairPoint further maintained that its overall penalty exposure would not be reduced by the reversion of bill credits because the amount of any reverted credits would not be counted against the cap on dollars at risk, and that individual CLECs might actually see their individual credits increase if another CLEC waives the WPP bill credits, at least with respect to those credits that are issued on a “per measure” basis.

2. Competitive Carriers' Position

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

In their reply brief, the Competitive Carriers asserted that FairPoint's requirement that CLECs waive performance standards and penalties which are required by orders of state and federal regulatory agencies fundamentally undermines both the purpose and the execution of the WPP. The Competitive Carriers maintained that approval of the proposed WPP without having addressed the commercial contract waiver issue would "leave the door open for FairPoint to once again, as it has in the past, avoid the payment of properly imposed penalties and, more importantly, allow FairPoint to provide poor, discriminatory service to CLECs thereby undermining the balance of the competitive market." Competitive Carriers' Reply Brief at 2-3. The Competitive Carriers criticized FairPoint's argument that state commissions do not have

jurisdiction over contractual waivers of WPP penalties, stating that “the proper functioning of the WPP is most certainly within this Commission's jurisdiction.” Competitive Carriers’ Reply Brief at 4-5. They further asserted that the already reduced penalties under the new WPP would be “rendered meaningless and ineffective if FairPoint is allowed to impose and enforce waiver provisions.” Competitive Carriers’ Reply Brief at 6. Accordingly, the Competitive Carriers asked the Commission to reject FairPoint's arguments and include language in the WPP prohibiting enforcement of any waivers of penalty bill credits, both past and future, under the existing PAP and the new WPP.

3. Staff’s Recommendation

In the Staff Memo, Staff took no position on whether the Commission has jurisdiction over commercial contracts such as those described by FairPoint in its initial and reply briefs. Staff noted, however, that the FCC has held that a necessary attribute of a performance assurance plan is “potential liability that provides a meaningful and significant incentive to comply with the designated performance standards.” Staff Memo at 11. Commercial contracts may waive penalties for services not required by Sections 251 or 271 of the Telecommunications Act, 47 U.S.C. §§251 and 271, in Staff’s view, but should not be allowed to affect potential liability under the WPP designed to provide incentives for FairPoint to comply with the specified performance standards. Accordingly, without taking any position on the issue of jurisdiction over commercial contracts, Staff recommended that the Commission require any WPP bill credits waived by a CLEC through a commercial contract or otherwise be paid to the Telecommunications Planning and Development Fund established under RSA 12-A:45-a. Staff maintained that, under this approach, a CLEC could choose to waive its right to receive potential bill credits or penalties under the WPP in exchange for other consideration, but all of the \$4.75

million penalty liability exposure in New Hampshire, as agreed to by FairPoint and the other Joint Movants, would continue to remain at risk to ensure that FairPoint's potential liability under the WPP remain meaningful and significant.

IV. COMMISSION ANALYSIS

The Joint Motion has presented the WPP for our consideration and approval in conjunction with a Stipulation and Settlement Agreement signed by the Joint Movants. Under N.H. Code Admin. Rules Puc 203.20(b), the Commission shall 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). We evaluate the substantive terms as well as the process that led to any negotiated settlement agreement. The fact that parties to a settlement agreement represented a diversity of interests and that issues were diligently explored and negotiated at length, serves as one indication that the results of the settlement are reasonable and in the public interest. *FairPoint Communications, Inc. et al.*, Order No. 25,129, 95 NHPUC 359, 390 (2010), *citing EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972, 94 NHPUC 256, 282 (2009). The Commission will not approve a settlement agreement "without independently determining that the result comports with applicable standards." *Id.* The issues must be reviewed, considered, and ultimately judged according to standards that provide the public with the assurance that a just and reasonable result has been reached. *Id.*

Consistent with our earlier order in this proceeding⁵, we are guided in our review of the proposed WPP by the goals described by the FCC as necessary for an appropriate performance assurance plan:

In the FCC order approving the first PAP for Verizon's interLATA entry in New York, the FCC accepted the PAP as a "benchmark against which new entrants and regulators

⁵ *New England Telephone Operations LLC d/b/a FairPoint Communications NNE*, Order No. 25,221 (May 6, 2011).

can measure performance over time to detect and correct any degradation of service,” *In re Verizon New England, Inc.*, 17 F.C.C. Rcd. 18660, 438 (2002). The FCC stated that a PAP has the following important characteristics:

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

In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd. 3953, 433 (1999).

Accordingly, we will proceed with an investigation intended ultimately to result in an appropriate performance plan for FairPoint that meets each of the goals described by the FCC.⁶

We have reviewed the Joint Motion and the WPP Stipulation and Settlement Agreement under this standard of review, and we find that the terms and provisions of the WPP are just and reasonable and serve the public interest, provided they are modified to reflect our resolution of the three outstanding issues briefed by the Joint Movants. We reach this conclusion in part based on the active participation in developing the WPP of a significant number of industry participants representing differing perspectives, and the absence of any objection to the terms of the WPP expressed by any other parties in this docket. We commend the Joint Movants for the substantial effort and cooperation they have invested in resolving the vast majority of outstanding issues regarding the existing PAP, including the issue of dollars at risk, and we recognize the active participation of Staff in facilitating the earlier stages of the settlement process.

The WPP represents a fair and reasonable balance between the interests of FairPoint and competitive carriers, in our view, and contains more specific metrics and billing credit penalty

⁶ *Id.* at 13-14.

provisions than the existing PAP. The WPP is simpler and more transparent than the PAP, as it contains clearly specified measures and standards. We believe that the WPP, as modified to incorporate our resolution of the three outstanding issues, will provide a self-executing mechanism to detect and sanction, and thus deter, poor performance by FairPoint in its provision of carrier-to-carrier services. In particular, we find that FairPoint's potential penalty exposure of \$4.75 million per year in New Hampshire will provide a meaningful and significant incentive for FairPoint to comply with the specified performance standards. In conjunction with our resolution of the outstanding disputes on late and inaccurate reporting, the effect of changes in law, and waivers of potential liability through commercial contracts, we find that the WPP will contain all of the characteristics necessary for an appropriate performance assurance plan.⁷

We believe the briefing schedule proposed by the Joint Movants and approved by the Commission provided sufficient due process for all parties under the circumstances and, as requested by the Joint Movants, we hereby waive any requirement under our procedural rules for any additional process, including discovery and hearing before the Commission, pursuant to our authority under N.H. Code Admin. Rules Puc 201.05.

We now address the three issues on which the Joint Movants failed to reach agreement, and which they discussed at length in their initial and reply briefs:

1. Terms and Penalties for Late or Inaccurate Reporting

We adopt Staff's recommendations with regard to the terms and penalties for late and inaccurate reporting under the WPP. FairPoint will be required to pay \$250 per day, with respect to New Hampshire, provided that not less than \$750 per day in total is payable for all three states, for any late filed reports. In the event that either Maine or Vermont does not require a

⁷ We note also that approval of the settlement and WPP pursuant to this Order will resolve the open issues consolidated from Dockets DT 09-059 and DT 09-113.

penalty of at least \$250 per day, such that the aggregate penalty for all three states would be less than \$750, then this penalty must be increased in New Hampshire so that the total dollars at risk to FairPoint from all three states is not less than \$750 per day for late filed reports. Allocation of the WPP bill credits for late-filed reports must follow the allocation for per measure metrics, by state.⁸

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. First, in order to provide an incentive for FairPoint to monitor and correct reporting inaccuracies in a timely manner, these penalty provisions should not apply if FairPoint identifies and corrects an inaccuracy within thirty days of issuance of the first report in which an inaccuracy appears. Second, in order that the WPP bill credit provisions be rendered reciprocal, the WPP must provide that any discovered inaccuracy with the effect of materially benefitting FairPoint must result in a reduction of future bill credits to CLECs under the WPP.

2. Change in Law Provisions

With respect to the effects of changes in applicable law, we generally agree with Staff's recommendation and the Competitive Carriers' position that any revision of the WPP terms and conditions based on a change in law should be implemented only after review and approval by the Commission. We agree with Staff that it is often the case that an FCC order or other change in law is subject to reasonable disagreement as to interpretation and effect. Allowing FairPoint to prohibit opportunity for debate about such a change in law may have an adverse effect on the clearly-articulated, pre-determined measures and standards agreed to by opposing parties and

⁸ The allocation of "per measure" bill credits under the WPP is described above in Section II.2 of this Order.

incorporated in the WPP. We therefore approve the following change in law provision proposed by the Competitive Carriers, subject to the further modification described below:

If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint and the parties to the respective Commission and Board dockets will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law. Upon agreement, such revisions will be submitted jointly by the parties participating in the negotiations to the Commissions and Board for approval. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commissions and Board.

We agree with Staff that FairPoint had raised a valid point that certain legal or regulatory changes may be very clear, even if others are subject to reasonable dispute. This concern may be addressed by permitting revisions to WPP performance metrics and related billing credits to be retroactive to the effective date of the change in law once the revisions have been reviewed and approved by the Commission. This approach would preserve our oversight of changes to the WPP, while effectuating the financial impact of any service or product delisting as of the time of the change in law, thereby diminishing any incentive to unnecessarily delay the state regulatory approval process. We therefore direct FairPoint and the other Joint Movants to develop specific language for inclusion in the change in law provisions of the WPP in order to effect this modification.⁹

3. Waiver of Bill Credits through Commercial Contracts

We agree with Staff that a necessary attribute of an effective performance assurance plan, consistent with FCC precedent and our prior orders, is “potential liability that provides a

⁹ FairPoint contends in its reply brief that the Competitive Carriers in their initial brief violated the confidentiality of the parties’ settlement discussions with respect to FairPoint’s positions on and proposed language regarding the change in law issues. FairPoint Reply Brief at 12-13. We remind all parties to strictly respect the confidential nature of settlement negotiations in any future proceedings in this or any other Commission docket, consistent with our procedural rules. *See* N.H. Code Admin. Rules Puc 203.20(a).

meaningful and significant incentive to comply with the designated performance standards.”¹⁰

We acknowledge that FairPoint has entered into certain contracts, which it characterizes as “commercial contracts,” that may or may not be beyond our jurisdiction. Because the issue is not before us, it is not necessary to make a determination regarding our authority over any such commercial contracts. We believe it is of critical importance, however, for FairPoint’s potential liability under the WPP not to be effectively undermined as a result of waivers given by CLECs in contractual arrangements or otherwise.

Without making any determination as to our jurisdiction over the terms and provisions of any commercial contract between FairPoint and a CLEC, we conclude it is critical for an effective performance assurance plan, such as the WPP, which is intended to function as the successor to and substitute for the existing PAP, to meet the FCC standard that FairPoint be exposed to potential liability that provides a meaningful and significant incentive to comply with the designated performance standards. We therefore require that any WPP bill credits waived by a CLEC through a commercial contract or otherwise shall be paid to the Telecommunications Planning and Development Fund established under RSA 12-A:45-a, to be used for the purposes of and subject to the procedures specified in Telecommunications Planning and Development Initiative, RSA 12-A:45 through 49. Pursuant to this modification, FairPoint’s potential liability under the WPP will remain meaningful and significant, even if one or more CLECs choose to waive the right to receive potential WPP bill credits or penalties in exchange for other consideration. FairPoint’s full \$4.75 million penalty exposure in New Hampshire, as agreed to by the Joint Movants, will continue to remain at risk as a substantial incentive for FairPoint to provide service to competitors meeting the defined standards.

¹⁰ *New England Telephone Operations LLC d/b/a FairPoint Communications NNE*, Order No. 25,221 (May 6, 2011).

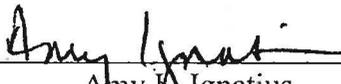
We direct FairPoint and the other Joint Movants to develop specific language for inclusion in the WPP in order to effect this required modification.

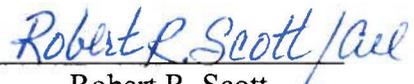
Based upon the foregoing, it is hereby

ORDERED, that the Joint Motion for Approval of Wholesale Performance Plan Stipulation and Settlement Agreement is hereby GRANTED, subject to the conditions regarding the three outstanding issues set forth in the body of this Order; and it is

FURTHER ORDERED, that the Joint Movants shall file a revised version of the complete Wholesale Performance Plan, modified based on the conditions of this Order and specifying the effective date of the Plan, within 30 days of the date hereof.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of January, 2014.


Amy Ignatius
Chairman


Robert R. Scott
Commissioner

Attested by:


Kimberly Nolin Smith
Assistant Secretary