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 Plan

REPLY BRIEF ON OUTSTANDING ISSUES RELATED TO WHOLESALE PERFORMANCE PLAN

In accordance with the Secretarial Letter of the New Hampshire Public Utilities Commission, dated October 18, 2013, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") hereby provides this Reply to the Initial Brief of the CLECs regarding outstanding issues related to the proposed Wholesale Performance Plan ("WPP").

I. Description and Purpose of the WPP

At the beginning of their brief, the CLECs assert that "[t]he objective of the WPP is to ensure that the telecommunications market remains open to robust competition," and for that reason, "the Plan must include all carriers and qualifying services, without exception."[1] This proclamation has a nicely aspirational flair to it, but it is factually incorrect and, from a policy standpoint, untenable. On its face, the proposed WPP is strictly a "self-executing remedy plan that ensures FairPoint NNE will provide services, access and interconnection to CLECs consistent with the requirements of the Communications Act of 1934, as amended, State law and regulation, and stipulations between the CLECs and FairPoint NNE."[2] As FairPoint observed in

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[1] CLEC Brief at 3.
[2] WPP at 1.

its Initial Brief, the objective of a performance plan is not to ensure an open market for "robust competition" for all carriers, but instead to ensure that FairPoint meets its strict obligations to provision non-discriminatory services to CLECs after obtaining Section 271 authority.

As the FCC has explained, a PAP "provides a mechanism by which to gauge a BOC's present compliance with its obligation to *provide access and interconnection to new entrants in a nondiscriminatory* manner"[3] and is "likely to provide incentives that are sufficient to foster *post-entry checklist compliance*."[4] The New Hampshire Commission reiterated that "[t]he goal of a PAP is to *assure parity performance*."[5]

On closer inspection, the idea that the WPP should ensure robust competition also makes no sense from a policy standpoint. If FairPoint's compliance with the obligations of Section 271 helps foster "robust competition," so much the better for the market, and FairPoint takes no issue with that result. This Commission and all other regulators, however, should resist any temptation to construct a plan that purports to achieve such a vague goal. The WPP is designed to ensure that FairPoint meets certain defined and objective metrics. "Robust competition," on the other hand, is an aspiration that is far beyond the power of FairPoint or the Commission to ever ensure. FairPoint can only meet its statutory obligations; after that, competition is up to those who purchase services and those who provide services.

Indeed, assuming merely for the sake of argument that "robust competition" really is the

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[3] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543 ¶ 393 (1997) (emphasis supplied).

[4] *Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02–61, Memorandum Opinion and Order, 17 FCC Rcd 11659 ¶ 61 (2002) (emphasis supplied).

[5] *See* DT 01-006, *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan*, Order Regarding Metrics and Plan, Order No. 23,940 at 77 (Mar, 29, 2002) (emphasis supplied).

objective of the WPP, then FairPoint submits that the objective has been surpassed and that this proceeding is now moot. Over the last ten years, FairPoint's share of the local exchange market has been so eroded by facilities-based providers that it can no longer be considered the dominant provider of local voice services. For example, as of December 2011, *almost 25%* of New Hampshire adults had cut the cord entirely in favor of wireless services and took no landline service at all.[6] This figure is certainly much higher now, almost two years later. Of the remaining 675,000 landlines in New Hampshire, all ILECs have *only 41%* of those lines as of December 2012.[7] Further, VoIP bundled with Internet (*e.g.* cable VoIP service from Comcast, Metrocast and Time Warner), now comprises over a third (36.7%) of land lines in the state.[8] It would be hard to argue that the telecommunications market in New Hampshire has not long been open to robust competition.

Of course, FairPoint is not suggesting that the Commission dismiss this proceeding at this point. FairPoint only seeks to emphasize that "robust competition" is no longer the fragile and endangered condition that the CLECs continue to evoke. Competition in the telecommunications industry is robust (if not rampaging), and what is interesting is that most of FairPoint's line losses have been due to competitors (*i.e.* wireless and cable) who use few, if any, of the services covered by the WPP.

FairPoint respectfully suggests that the Commission disregard appeals to establish any "pro-competitive" aspects of the WPP, and confine its inquiry simply to whether the WPP

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[6] CDC Wireless Substitution, State Level Estimates Dec 2011, Table 1. (Attached hereto as Exhibit 1) (full report available at http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf).
[7] FCC Local Telephone Competition Report - 12/31/12, Table 9. (Attached hereto as Exhibit 2) (full report available at http:// hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324413A1.pdf). Because there are other ILECs in New Hampshire, FairPoint's share of those lines is of course even less.
[8] *Id.*

effectively motivates FairPoint to meet its statutory obligations. With this background, FairPoint discusses the remaining issues in this docket in Sections II through IV below.

II. Terms and Penalties for Late or Inaccurate Monthly Reports

As did FairPoint, the CLECs have proposed language concerning terms and penalties for late or inaccurate monthly reports. Key provisions of the CLECs' proposals verus FairPoint's proposals include:

Penalties:

- There is no cap on the penalties for late/inaccurate reports. The potential exposure exceeds **$12 million** (in the case of inaccurate reports), an increase by a factor of 100 from the current $120,000. Contrast this to FairPoint's proposal of a cap $60,000 per year for each state, for a total of $180,000.

- The daily penalties for late reports are $500 per state, as contrasted to FairPoint's proposal of $250 per state.

- For inaccurate reports, corrected bill credits must be issued to CLECs retroactively for 12 or 24 months, depending on the size of the inaccuracy, or for the time period of any audit that discovers the inaccuracy, however great. Contrast this with FairPoint's proposal and the current Maine PAP, in which credits are refunded only for the months in which the error has been identified and any months following.

- For inaccurate reports, a minimum of 15% of the bill credits due are assessed as a penalty, unless the interest (at FairPoint's tariffed late-payment rate) on these credits is greater, in which case interest will be paid, with no cap. This penalty is imposed even if FairPoint identified the error on its own. Contrast this with FairPoint's proposal and the current Maine PAP, in which penalties are not imposed at all if FairPoint identifies the error.

- If, after 60 days, FairPoint cannot produce accurate reports for any reason, penalties of $1 million dollars per month accrue, less any bill credits paid that month, *i.e.* immediate escalation to the total dollars at risk for that month. Contrast this with FairPoint's proposal of a penalty of $250 per day, or approximately $7,500 per month.

- These terms are not reciprocal; if an inaccuracy accrues to FairPoint's benefit, the CLECs retain any excess bill credits that were disbursed to them, and FairPoint has no recourse for recovery.

- Finally, in all cases, the CLECs propose that the penalties now be remitted to them, contrasted with FairPoint's proposed language which continues to make payments into a

state fund.

Posting of reports:

- As with FairPoint's proposed language, the CLECs propose that reports are now posted on FairPoint's website and therefore any provisions related to physical delivery are moot. However, the CLEC proposed language contains no "force majeure" provision that clarifies the limits of FairPoint's obligation under this section.

Standard of proof:

- The CLECs propose no standard of proof for a complaint. If the CLEC requests an audit, it must obtain approval from the Commission and be prepared to pay, at least initially, for the auditor's expenses.

Materiality:

- The CLECs propose two materiality thresholds of $500 and $1000 for an individual CLEC, contrasted with FairPoint's proposal which retains the one materiality threshold of $1,000.

- At the $500 level, FairPoint must restate all monthly reports for the period 12 months prior to discovery of the error.

- At the $1000 level, FairPoint must restate all monthly reports for the period 24 months prior to discovery of the error.

Dispute resolution:

- The CLEC language imposes no duty of diligence on a CLEC to examine or even obtain its monthly reports. The only duty is to inform FairPoint of an inaccurate report within 30 days of discovery, whenever that may be. Upon discovery of an inaccuracy, FairPoint is obligated to review and restate reports for up to 24 months.

- As with FairPoint's language, the CLECs propose a collaborative process for handling disputes regarding reports, leading to Commission intervention, if necessary.

- CLECs can initiate an audit (with Commission approval) outside of the normal audit cycle. This audit is initiated at the CLEC's expense, although there is no provision to reimburse FairPoint for its internal expenses of participating in this audit, including responding to audit requests. FairPoint will reimburse the CLEC for the auditor's expenses if the audit confirms the CLEC issue.

As FairPoint explained in its Initial Brief, there is no need for provisions that penalize it for late or inaccurate reports. However, if the Commission in its judgment believes there is a

need, FairPoint is nevertheless amenable to reasonable terms that offer assurances of FairPoint's commitment to timely and accurate reports.

In its Initial Brief, FairPoint has proposed language that adheres closely to the language in the Maine PAP. As FairPoint asserted, the provision in the Maine PAP for late or inaccurate reports has never been invoked, and no penalties have ever been assessed on FairPoint or, to FairPoint's knowledge, its predecessor, Verizon. Given this, FairPoint's proposed language concerning late or inaccurate reports is a reasonable way to address an issue that does not appear to have been a significant concern to the state regulators or the CLEC parties and which does not directly impact the actual provisioning of wholesale services. It conforms to the purpose of the WPP, while prescribing penalties that are proportional to the historical likelihood of any problems and the level of inconvenience they present.

By contrast, the CLEC proposal differs significantly; so significantly, in fact, that it is doubtful that it really concerns incentives related to late or inaccurate reports. On close examination, it appears rather to be 1) a self-enrichment arrangement, 2) an abdication of the CLECs' duties of diligence, and 3) a post-settlement expansion of the audit provisions and performance penalties. All are justified by the CLECs on the ground of some abstract "harm" that is never defined. These flaws are explored further in the following subsections.

A. CLEC Enrichment

The CLECs have turned to the late/inaccurate report provisions to create another source of non-operating income, masquerading as "incentives" for FairPoint. For example, the CLECs propose "a simple $500 penalty per State," for late reports, explaining that "[t]his penalty is in the same amount currently contained in the Maine PAP,"[9] but they neglect to mention that this

[9] CLEC Brief at 12.

penalty is currently remitted to the state. Now, without ever acknowledging this distinction, they insist that these penalties be paid to them to compensate for the "harm" they have incurred.[10]

As for inaccurate reports, the CLECs not only propose that errors as small as $1000 should require a 24 month restatement, but that FairPoint should also be assessed a charge amounting to at least 15% of any unpaid credits, even if it was FairPoint that identified the problem in the first place. Payable, of course, to the CLECs.

If FairPoint cannot produce corrected reports within 60 days, the CLECs propose that FairPoint begin paying penalties equal to *the entire amount of dollars at risk* for the next month and each succeeding months until the report is corrected; that is, $1 million per month across all three states. Payable, of course, to the CLECs.

Even though the late/inaccurate report provisions have never been invoked, and that no specific injury has been claimed, the CLECs assert that the penalties must be significant enough to create incentives for accurate reporting. However, by increasing these penalties (in some cases to extreme levels) and diverting the "incentive" payments from the states to themselves, the CLECs have revealed the true nature of these provisions. Far from being an incentive program for FairPoint, they are a bonus program for CLECs, generating non-operating income that has no demonstrated link to any harm they have suffered and is far out of proportion to any failure by FairPoint. Also particularly notable about the CLEC proposal is that, unlike the current Maine language, there is no provision for refunds to FairPoint in the case that an inaccurate report results in an overpayment to the CLECs.

B. CLEC diligence

The CLECs commend themselves for assuming the "obligation on each carrier to also

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[10] *Id.* at 15.

review its monthly reports for errors, and report the discovery of any inaccuracies to FairPoint on a timely basis *(i.e.* within 30 days of discovery of an error)."[11] However, the CLECs propose no deadline to exercise this obligation, and have eliminated the current requirement that they report any errors within 30 days of electronic availability of an allegedly inaccurate report. Instead, they have structured their proposal to now give themselves a least *24 months* to get around to reviewing their reports (or being informed by other means), during which time FairPoint remains liable for restatement, remuneration and penalties. If the inaccurate reports are discovered through an audit, that time period can be extended even further, back to the initiation of the audit. This simply is not reasonable.

The CLECs propose that any material error be corrected going back anywhere from 12 to 24 months, with this 24 months extended for the period of any audit that discovered any errors. This is an automatic and blanket requirement. Unlike the current provision, the CLECs no longer have to review and identify any of the reports that are in error. In practice, this means that CLECs are only under an obligation to inspect their monthly reports every two years. Furthermore, as mentioned in the preceding sections, the CLECs do not propose any type of refund to FairPoint in case FairPoint has overpaid any billing credits, unlike the current Maine provisions and those proposed by FairPoint. Finally, all of these remedies are imposed on FairPoint even if it was FairPoint that identified the error. In this way, the CLECs get the best of both worlds: the CLECs save money by shifting some of their back office responsibilities to FairPoint, and they make money through the penalties derived from FairPoint's self-investigation.

The CLECs claim that the lengthy restatement period is justified because "[t]he Maine

[11] *Id.* at 13.

PAP imposes a similar timeframe for correction of performance reports."[12] This claim is incorrect on its face and misleading in its effect. The provision that the CLECs refer to (but do not quote) is in all three state PAPs and involves only the limitation on *challenges to PAP performance*. This provision does not say anything about remedies (retroactive or otherwise), does not refer to monthly reports at all, and certainly says nothing about restating monthly reports. In pertinent part, this provision states that

> Verizon ME will make available CLEC-specific C2C electronic reports enabling those receiving the reports to evaluate performance at greater levels of detail. . . . A two-year statute of limitation on challenges to PAP performance will be adopted and effective November 15, 2003 for the October 2003 performance report. The initiation of this provision is contingent upon Verizon ME providing the algorithms, in a structured format, related to the PAP metrics to the Commission Staff prior to November 15, 2003.[13]

Furthermore, contrary to the CLECs' contention, the Maine PAP is clear that corrective action is confined to the hear-and-now. It provides that:

> Corrected C2C and PAP reports are only required for the current month if the effect of the error(s) on the associated PAP is "material" (as defined above in 2.a.and the related footnote), or if the corrections cause changes to the performance scores in the CLEC's favor. . . . When a material error is found, reports and the underlying data for the current month will be corrected and filed within 30 days. Non material errors will be corrected on a prospective basis.[14]

Finally, it is one thing to limit the period in which one can bring a challenge, and another thing to establish a penalty structure that creates an incentive for a party to sit on its rights up to the last minute. This is what the CLECs propose. Not only can they dally for two years or more, but they collect *at least 15%* of the amount that accumulates during that period. The Commission should not countenance any terms that allow a CLEC to not only abdicate its duty to attend to its business, but then to collect a windfall as a reward.

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[12] CLEC Brief at n. 10.
[13] Maine PAP at 19 and n.19.
[14] *Id.* at 21 and n.22.

C. Audit terms

The CLECs proposal seeks to modify the settled terms of the WPP in regard to audits. The WPP audit terms on which the parties agreed specified that audits will be conducted no more frequently than every two years and that corrections or modifications will be applied across all three states. It says nothing about retroactive application of those findings. However, with their proposed restatement period for "inaccurate reports" based on the audit findings, the CLECs are essentially adding remedies and penalty provisions into audit provisions that the parties have already agreed on. It should also be noted that the proposed terms expressly override the terms of the WPP, allowing any CLEC to initiate an audit at any time, regardless of where FairPoint is in the audit cycle. Audits of any kind are burdensome, resource draining, time consuming, and costly undertakings. Under the CLECs' proposal, FairPoint could be harassed constantly with multiple simultaneous audits initiated by numerous CLECs, notwithstanding the terms of the WPP that limit the frequency of audits. This is not what FairPoint agreed to regarding the audit provisions, and the CLECs should not be permitted to renege on their agreement by smuggling in additional audit provisions.

Taken as a whole, the CLEC proposal is notable by its absence of balance and lack of proportion. As The Liberty Consulting Group advised in its recent audit report:

> The magnitude of penalties for poor performance should be sufficiently large to incent better performance but not so large as to be unnecessarily punitive. The FCC's BANY Order concluded that the potential liability of a performance assurance plan should provide "a meaningful and significant incentive to comply with the designated performance standards." Ideally, these penalties should be directly related to the competitive harm caused by the performance failure.[15]

Contrary to this principle, the CLECs are proposing a significant expansion of FairPoint's

[15] NH PUC Docket DT 11-061, The Liberty Consulting Group Final Audit Report of FairPoint at 178-179 (Jan, 4, 2013) (available at http://www.puc.state.nh.us/Regulatory/Docketbk/2011/11-061.html) ("Liberty Audit Report").

penalties exposure, even though the harms of which they complain are vague and speculative. The CLECs claim that "[i]n instances where errors are material and poor performance is hidden by inaccurate reports (known or unknown), the competitive market is harmed and bill credits may be improperly avoided."[16] However, this allegation regarding the harm to the competitive market is unaccompanied by any explanation of the nature of this harm or the manner in which it is inflicted, nor does it quantify it in any way (other than to imply that it can be ameliorated with large amounts of money). The best that the CLECs can do to establish the need for the incentives/bonuses they seek is to refer to the results of the Liberty Audit Report and the so-called "inaccuracies" it reported. The CLECs claim that "[t]he PAP audit conducted by Liberty Consulting Group, for example, reported 115 defects[5] (inaccuracies) in a review of only 105 metrics" and that "more inaccuracies likely existed than were reported by Liberty."[17] However, this claim is incorrect, misleading and speculative. The CLECs misleadingly equate any defect in FairPoint's processes with an "inaccuracy," when in fact this was not the case, and Liberty never suggested that this might indicate any kind of pattern. For example, some defects related to internal process documentation, monthly quality reviews, or differences in the interpretation of the C2C or PAP documentation.

D. Summary

In light of the parties' experience that late and inaccurate reports have not been a problem, the CLEC proposal is an unreasonable and self-serving overreach, undocked from any principles related to incentives. The Commission should reject the CLEC proposal and accept FairPoint's proposed language.

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[16] CLEC Brief at 13.
[17] *Id.* at 11.

III. Change of law provisions

Before discussing its views of this issue, FairPoint must diverge for a moment to voice its strong objection to the CLECs' breach of the confidentiality of the settlement discussions on this issue, an offense compounded by their misleading reporting of those discussions. In their brief, the CLECs have spent almost no time at all discussing the merits of their own proposal, but instead have brazenly divulged FairPoint's position during the negotiations, have twisted it to meet their needs, and then have proceeded to rebut that position in their Initial Brief. As a result, the CLECs have given FairPoint very little to respond to, while at the same time they have appropriated for themselves extra time to craft a second rebuttal to FairPoint's proposal, extra time to craft their own argument, and the ability to offer their initial position in their so-called "Reply." While FairPoint insists on no specific remedy for this breach (except perhaps a formal admonishment), it respectfully requests that the Commission remain open to permitting FairPoint the option of a Sur-Reply as a defense against this gaming by the CLECs.

Getting to the merits, the CLECs have unilaterally exposed FairPoint's position on this issue so that they can construct a strawman argument in which they claim that FairPoint seeks to "unilaterally" amend the WPP. They are wrong on a number of levels, and for a number of reasons. The CLECs begin by claiming that, during once-confidential discussions, the parties reached agreement in principle on the following terms to account for changes in law:

> 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.

This is not true. FairPoint did not, nor would it, agree to these terms in isolation. As FairPoint's proposal demonstrates, FairPoint believes that there is one issue that does not require

negotiations or extensive process, and that is the issue of whether FairPoint should be measured on services that it is no longer required to offer, *i.e.* "delisted" services. FairPoint's proposal consists of two parts. The first is similar in effect to the CLECs' proposal. The second reflects FairPoint's position on the measurement of delisted services:

> 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.

The CLECs object to this language. Again divulging once-confidential discussions with FairPoint (and at one point even quoting the language from one of FairPoint's confidential proposals),[18] the CLECs coyly suggest that they "expect" FairPoint "to propose provisions that reserve for itself the unilateral right to modify Plan terms."[19] This is incorrect, as there is nothing unilateral about FairPoint's proposed terms. But having established this misleading strawman, the CLECs proceed to devote most of their discussion to knocking it down. They claim that FairPoint could "decide that it is not required to provide any service/product currently reported in the WPP and would unilaterally eliminate any metrics or bill credits associated with that service/product" and "there would not even be a process under which the terms of the Plan would actually be modified, as FairPoint's determination would simply remove metrics and bill credits without any Plan amendment or Commission approval."[20]

Contrary to the CLECs' fabricated scenario, nothing about this process will be unilateral or disorderly; it will just be streamlined. This is a feature that all parties would ordinarily consider to be an overall benefit, but apparently not in this case. Under FairPoint's proposal, any

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[18] CLEC Brief at 9.
[19] *Id.* at 8.
[20] *Id.* at 9.

delisting of a particular UNE or service will already have been subject to extensive due process at the federal level. That should be enough, as federal law controls whether a service is delisted or not delisted. It is really as simple as that.

FairPoint is not proposing that any other revisions to the WPP be handled in this manner. As its proposal indicates, FairPoint is amenable to a process in which "FairPoint and the CLECs will promptly renegotiate in good faith and amend the WPP." However, regarding delisted products and services, there is no plausible reason to introduce any more of a process, except to perpetuate the income stream that the WPP represents (especially under the CLEC proposal). In that case, delay benefits the CLECs. Were it not for this CLEC position, there really would be nothing to discuss about delisted services.

To the extent that the CLECs justify the merits of their own proposal, they assert that it represents "an orderly process for the implementation of such developments in a bilateral manner . . . with proper Commission oversight" and avoids "unilateral modification by any one party."[21] The CLECs do not provide an estimate of the time that this process will take, but it will clearly be many months. After all, the CLECs already have described the process so far as "painstaking."[22] Under the CLEC proposal, after the service is delisted, the Commission would issue an Order of Notice in this docket, after which the FairPoint and the CLECs would begin negotiations on amendments that would be submitted to the Commission for approval. If after 90 days, the parties cannot agree on the proper terms, then the issue would be referred to the Commission for resolution. Unlike other types of ILEC-CLEC disagreements (*e.g.* interconnection negotiations), there would be no deadline for Commission action.

If an orderly, bilateral, Commission supervised process is truly the goal of the Change of

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[21] CLEC Brief at 7.
[22] *Id.* at 8.

Law provision, then FairPoint believes that its proposal accomplishes that. FairPoint's proposed language concerning change of law conforms strictly to the subject matter of the WPP, contemplates a reasonable opportunity for the parties to discuss any legitimate concerns, and is reasonable and fair.

IV. Commercial contract provisions that waive WPP credits

The CLECs claim that "[i]f the WPP allows FairPoint to obtain or enforce waivers of . . . bill credit penalties (such that penalties are not paid out) from individual CLECs, the pro-competitive incentive structure of the Plan breaks down for all CLECs and the overall competitive marketplace."[23] As they explain it, bill credit reversions reduce FairPoint's financial incentive and bring harm to all carriers because they "threaten the efficacy of the PAP as a means of preventing backsliding in the delivery of wholesale services to carriers."[24]

Using a series of loaded terms, the CLECs complain that they are "required" to sign agreements "imposing terms" that "extract" waivers and that FairPoint should be barred from employing such "contrivances."[25] The CLECs portray themselves as hapless victims of FairPoint's strong-arm "tactics" and implicitly disclaim any responsibility for themselves as independent agents that are capable of negotiating business arrangements on an arms-length basis.

As the basis for this argument, the CLECs recite their frustrations with the terms of the Wholesale Advantage Agreement ("WAA") and how those terms reduced FairPoint's past payment of bill credits by half, and thus these types of terms reduce FairPoint's overall exposure by half. The CLECs position reflects a misunderstanding of the terms of the proposed WPP and

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[23] CLEC Brief at 3.
[24] *Id.* at 5.
[25] *Id.* at 4-6.

its relation (or lack thereof) to commercial agreements in general and the WAA in particular.

First, any terms of the WAA are irrelevant under the proposed WPP. As FairPoint explained in its Initial Brief, the WPP does not include metrics related to UNE-P service; thus, by the express terms of these agreements, performance bill credits to CLECs that have entered into WAAs will no longer revert to FairPoint when the WPP is implemented. Second, by the terms of the WPP, FairPoint's overall exposure is not reduced by the reversion of bill credits, and individual CLECs will actually see their individual credits increase if another CLEC opts out of the WPP.

The reason for this is that, of the 132 metrics eligible for bill credits, 10 metrics are calculated on a "per measure" basis and those penalties are placed in a pool from which they are allocated to all eligible CLECs based on their proportional use of FairPoint's services.[26] The WPP provides that "[t]he total [per measure] performance bill credit amount set forth in Table 1 will be issued and posted to CLEC BANs and will be allocated among CLECs that receive bill credits under the Plan."[27] This means that 100% of the agreed amount of per measure bill credits will be issued, but that credits are allocated only among CLECs that are eligible to receive bill credits – resulting in each participating CLEC receiving a larger proportion than it would if other CLECs choose to have bill credits revert to FairPoint. The remaining 122 metrics are payable on per unit basis. Any penalties are credited to individual CLECs. These credits are not affected in any way, shape or form if another CLEC chooses to not accept WPP bill credits.

As for the overall dollars at risk, the WPP provides that "[t]he cap will encompass only those bill credits actually posted to CLEC BANS for missed performance (including

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[26] WPP § B.2.a.
[27] *Id.*

escalators)."[28] This means that any bill credits that revert to FairPoint are not counted toward the cap, since they are never posted to a CLEC BAN. Once again, depending on FairPoint's performance, this could accrue to the benefit of participating CLECs, since the total dollars at risk are available to a smaller pool of CLECs.

In short, no CLEC will see its per transaction bill credits reduced, there is a possibility that these per transaction credits will be less restrained by the cap, and the entire pool of per measure credits will be distributed among those CLECs that continue to receive bill credits. Furthermore, while the WPP has the feature of being self-effectuating, the Commission always retains the authority to intercede if FairPoint fails to fulfill its obligations.

The harm that the CLECs posit is vague and speculative, as it relies on a tenuous connection between individual CLEC action and overall industry harm. Moreover, while they focus on strengthening FairPoint's incentives under the WPP, they fail to balance this against the possible weakening of FairPoint's incentives to offer other wholesale services under the affected commercial agreements – services that FairPoint is under no obligation to offer otherwise.

The CLECs' proposal is also self-serving, and possibly anti-competitive, since it has the effect of reducing the options for other carriers who, for reasons of their own, opt to bargain over their performance bill credits. But its greatest weakness is that the CLECs have suggested no mechanism on how to implement their proposal, nor do they cite any authority under which the Commission can command it. This strongly suggests that theirs is not a serious proposal, but a vague complaint that the Commission is expected to sort out. If so, it raises a number of intractable questions. Are the CLECs suggesting that the WPP will preclude FairPoint from including reversion language in any commercial agreement? What would the WPP provisions

[28] WPP § F.

look like? Would a CLEC be prevented from offering such concessions on its own, or would it be barred from doing so in the interest of all CLECs? What about other terms that benefit FairPoint – if it cannot receive reverted bill credits, will it be precluded from increasing the prices for its commercial services beyond a certain amount, or bargaining for other benefits? How will that be enforced? What happens if FairPoint decides to withdraw a commercial offering entirely -- would a CLEC be barred from offering concessions in order to preserve access to a valued FairPoint offering?

As FairPoint explained in its Initial Brief, this is not a legitimate issue for discussion in this proceeding because it involves matters outside its scope and beyond the Commission's jurisdiction. The reversion of WPP billing credits is a bargained-for benefit that in no way alters the WPP, or any carrier's right to WPP payment; it simply provides that the carrier may relinquish this right as consideration for a bargained-for benefit. In addition to other consideration, FairPoint's commercial customers exchange the *potential* for billing credits from the WPP for something else of *immediate and tangible* value, *i.e.* access to a telecommunications service to which they have no legal right but which they consider of benefit to their businesses. The Commission should decline to hear or decide this issue, or find that there is no lawful reason to impose any restrictions on any party's contractual rights outside of the WPP.

V. Conclusion

Each of the CLECs' proposals goes beyond the fundamental objectives of the WPP. FairPoint's proposals regarding these issues are balanced and fair, and hew closely to the spirit and intent of the WPP. FairPoint respectfully requests that the Commission accept FairPoint's proposed provisions.

Respectfully submitted,

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

By Its Attorneys,
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