STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 10-183

Petition by Certain Rural Telephone Companies
Regarding CLEC Registrations within Their Exchanges

REPLY BRIEF OF THE RURAL TELEPHONE COMPANIES

Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc. and Granite State Telephone, Inc., each a rural local exchange carrier and a rural telephone company (together, the "RLECs"), hereby submit their Brief in Reply to Initial Briefs of the New England Cable and Telecommunications Association ("NECTA") and segTEL, Inc. (together the "Opposing Parties") in the above captioned proceeding.

I. THIS INQUIRY SHOULD NOT BE CONDUCTED UNDER THE DILUTED STANDARD PROPOSED BY THE OPPOSING PARTIES.

In their briefs, consistent with their testimony, both NECTA and segTEL have mischaracterized the standard against which RSA 374:22-g should be interpreted, in a manner that softens it. As the RLECs explained in their Initial Brief, Section 253(a) on its face is concerned only with *state actions* that *prohibit* competitive entry. However, NECTA and segTEL seek to considerably dilute this standard. For example, NECTA asserts that "[s]tate or local authority is a federally preempted entry barrier if it would have *a significant effect* on the ability of a telecommunications provider to compete against an ILEC,"[1] or if "those provisions of state or local law . . . make it *more difficult* for another carrier to compete in an ILEC-served

[1] NECTA Brief at 4 (emphasis supplied).

area."[2] In other parts of their briefs, the burdens do not even have to rise to that level. According to NECTA and segTEL, even the simple anticipation of difficulty is a preemption matter. NECTA claims that a hearing requirement "significantly increases the *potential* burdens" for CLECs,[3] and segTEL goes so far as to assert that Section 253 preempts the "mere possibility" of prohibition, citing a federal case that neither states nor implies anything of the sort.[4]

Taking this a few steps further, segTEL appears to argue that this proceeding itself, although in conformance with the state Supreme Court's remand, is itself a violation of Section 253 because segTEL has delayed its market entry while this proceeding is pending.[5] This is a creative argument, but it falls apart on closer examination. Taken to its logical conclusions, even the Commission's Form 10 registration would be preempted, since a carrier is prohibited from offering service until approved. For that matter, segTEL's argument seems to say that any Commission regulation would be preempted, since it creates the "mere possibility" that a carrier could be prohibited from offering service.

It is important to note that, other than segTEL's interesting formulation, neither of the opposing parties has alleged or established that RSA 374:22-g is, or could be, an outright prohibition. They claim only that the requirements of RSA 374:22-g and RSA 374:26 make it "more difficult,"[6] or pose a "significant barrier to entry"[7] or "inhibit"[8] new entrants. These,

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[2] *Id.* at 5.
[3] *Id.* at 2.
[4] segTEL Brief at 5 (citing to Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006)). The referenced page describes the law surrounding Section 253 preemption, closing with the statement that "a regulation need not erect an absolute barrier to entry in order to be found prohibitive." The RLECs submit that this there is a significant difference between a burden that is "not an absolute barrier" and one that is a "mere possibility."
[5] *Id.* at 9.
[6] NECTA Brief at 5.

however, are not the thresholds prescribed by Section 253 or the Supreme Court. Section 253 provides that no state or local statute or regulation, or other legal requirement, "may *prohibit* or have the *effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service." The state Supreme Court has determined that this is an issue of whether a state law "*materially* inhibits or limits the ability of any competitor or potential competitor to compete in a *fair and balanced* legal and regulatory environment."[9] As the RLECs emphasized in their Initial Brief, any "difficulties" or "barriers" that competitors encounter must amount to a *material impediment* to their ability to compete. Furthermore, Section 253 provides that the Commission can consider the issues of fairness and balance that the Court referenced, as well as to impose requirements necessary "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

Any entry process that allows unregulated competitors to surgically cut into a regulated RLEC's high margin services while ignoring universal service goals is not "fair and balanced," is not "competitively neutral," and does not "safeguard the rights of consumers." Thus, the Commission should base its inquiry on a whole reading of the statute, not a watered-down version of one single provision related to preemption.

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[7] *Id.* at 3.
[8] *Id.* at 5.
[9] Union Tel. Co., 160 N.H. 309, 321 (2009).

II. OUTSIDE AUTHORITY RELIED ON BY THE OPPOSING PARTIES IS NOT RELEVANT TO THIS INQUIRY.

In their Initial Brief, the RLECs reviewed the key cases related to Section 253 preemption and distinguished from the circumstances of this proceeding, including one case cited by segTEL, *Silver Star*.[10] In its brief, segTEL claimed that this proceeding is identical to *Silver Star*,[11] but this is not correct. *Silver Star* is a case in which state law gave ILECs with 30,000 or fewer access lines the ability to block the applications of potential competitors. *Silver Star* thus concerned a situation in which *express* veto power was vested in the ILEC. Here, in this case, there is no power vested in the ILEC; the public good finding is delegated to the Commission, which must consider a number of factors that may or may not militate in favor of granting the application unconditionally.

NECTA referred to a case in which the Wisconsin Public Service Commission made the legal finding that the state statutory scheme imposing a hearing and its associated proceeding formalities "would have 'the effect of prohibiting' [an] applicant from being a competing provider of the service" and "create[d] a barrier to entry that impedes a competition objective of the FTA, [was] contrary to the intent of Congress in the FTA, and [was] not competitively neutral under § 253(b)."[12] However, this is not the complete story. The Wisconsin commission preempted its market entry statute because the relevant statute provided that the commission must find that competitive service was "*required,*" that it was not covered by the "safe harbor" of

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[10] *Silver Star Telephone Company Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, CC Docket No. 97-1, 12 FCC Rcd 15639 (1997) ("*Silver Star*").

[11] segTEL Brief at 7.

[12] NECTA Brief fn. 4 (citing to *Sprint Communications Company LP*, No. 6055-NC- 103, 2008 WL2787762 at 8 (Wis. P.S.C. 2008) ("*Wisconsin Decision*").

Section 253(b), and that it was not competitively neutral.[13]

The Wisconsin statute at issue, Wis. Stat. § 196.50(1)(b)2.d, provides that:

> the commission may not grant any person a certificate, license, permit or franchise to own, operate, manage or control any plant or equipment for the furnishing of local exchange service in a municipality . . . unless . . . [t]he commission, after investigation and opportunity for hearing, finds that public convenience and necessity requires the delivery of service by the applicant, in which case the [incumbent]'s obligation to be provider of last resort is eliminated.[14]

Like the cases that the RLECs distinguished in their Initial Brief, the Wisconsin commission's holding rested on its determination that the statute raised too high a bar since, although not expressly barring competition, the statute presumed that a competitor could only be permitted if its services were "required."[15]

Notwithstanding its overall holding, the Wisconsin commission did allow that it could impose conditions on CLEC entry consistent with Section 253(b):

> At a minimum, the Commission may look to Wis. Stat. § 196.03(6) for a multi-factor test to evaluate whether, under Wis. Stat. § 196.203(3)(a), the public interest requires imposition of provisions of Wis. Stat. ch. 196 upon the proposed services of the Applicants. . . . [It is] state policy to maximize competition, but only as consistent with other stated public interest goals - which could be other factors in Wis. Stat. § 196.03(6).[16]

The factors in Wis. Stat. § 196.03(6) bear a strong resemblance to those in RSA 374:22-g:

> (a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.
> (b) Promotion of consumer choice.
> (c) Impact on the quality of life for the public, including privacy considerations.
> (d) Promotion of universal service.

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[13] *Id.* (emphasis supplied).
[14] Wis. Stat. § 196.50(1)(b)2.d. Note that the Wisconsin statute reflects principles of fair and balanced competition, understanding that an RLEC cannot be subjected to competition and still be expected to shoulder the duty of being the carrier of last resort.
[15] *Wisconsin Decision* at 8.
[16] *Id.* at 11.

(e) Promotion of economic development, including telecommunications infrastructure deployment.
(f) Promotion of efficiency and productivity.
(g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

If anything, then, the Wisconsin Order supports the RLECs' position, which acknowledges that competition is dictated by the Telecommunications Act, but subject to consideration of the public interest in regard to universal service and, by implication, carrier of last resort obligations.

III. THE OPPOSING PARTIES HAVE EXAGGERATED THE BURDEN OF THE STIPULATED PROCEDURES.

NECTA and segTEL argue that an RSA 374:22-g inquiry would result in very high costs to CLEC applicants relative to prospective gains from entering the small RLEC markets.[17] Concerning the costs, NECTA specifically claims that this inquiry would amount to a full rate case,[18] and references a Massachusetts case in which "a limited review of earnings" developed into a rate case proceeding. segTEL imagines that, contrary to general rules of procedure, the burden of production would fall on the CLEC applicants.[19] NECTA concludes that "New Hampshire residential and business customers will be disadvantaged if CLECs elect not to compete in New Hampshire rural areas because of the burdensome nature of the entry process."[20]

As the RLECs established in their testimony and Initial Brief, these concerns are exaggerated. While precise figures have been hard to come by in this proceeding, the RLECs have produced evidence that the rewards are much greater than NECTA and segTEL estimate them to be. Furthermore, it makes no sense to assume that the RSA 374:22-g inquiry will be tantamount to a rate case. As Mr. Meredith testified "the inquiry related to the RSA 374:22-g

[17] NECTA Brief at 3.
[18] *Id.* at 17.
[19] segTEL Brief at 8.
[20] NECTA Brief at 8.

factors does not need to delve deeply into individual service costs. Instead, it involves a higher level analysis of fixed and common costs as they relate to average revenue per user."[21] It is for this reason that the experience of the Massachusetts commission is inapplicable to this proceeding. The issues are not the same. In the Massachusetts proceeding, the commission was conducting an assessment of Verizon's *rates* to see if they were reasonable in relation to costs and could be used as the baseline of a price cap rate incentive plan for Verizon.[22] However limited the Massachusetts commission's intentions were, this inevitably necessitated a *bottom-up* review of individual rates and their constituent costs to determine if they reflected a reasonable rate-of-return. In contrast, the RSA 374:22-g inquiry is not concerned with rates, but only the *overall rate-of-return* of the incumbent, i.e. a *top-down* review of whether revenues cover costs, particularly sunk costs.

NECTA also suggested that USF and stimulus funding (if any) would have an impact on this inquiry.[23] To the extent that the Commission agrees with NECTA's suggestion, however, it is relevant not in this proceeding, but in an actual RSA 374:22-g inquiry.

In its brief, segTEL engages in a certain amount of hyperbole, imagining a fictional scenario in which it is required that "the CLEC . . . provide justification for the RLEC's ability to show a profit" and that "a CLEC collect and file information on any entity but itself."[24] It proceeds to advance this straw man argument by asserting that "New Hampshire's law is unique because it puts the burden of proving not only that competition itself is in the public good, but that the entity against which an entrant will compete is fully capable of withstanding that

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[21] Meredith Rebuttal at 10:14-17.
[22] Paul B. Vasington, "Incentive Regulation in Practice: A Massachusetts Case Study," Review of Network Economics, Vol. 2, Issue 4, December 2003, p. 455 (available at http://www.bepress.com/cgi/viewcontent.cgi?article=1038&context=rne).
[23] NECTA Brief at 14.
[24] segTEL Brief at 8-9.

competition."[25] Nothing in the record supports these statements. First, the RLECs agree that RSA 374:22-g manifests a public policy that competition is a public good, under certain conditions, and no party needs to further establish that. Moreover, the RLECs have testified to their understanding that an applicant cannot be expected to have the burden of production in an RSA 374:22-g inquiry,[26] nor that the applicant demonstrate the RLEC's ability to turn a profit or "fully withstand the competition," neither of which is an enumerated factor.

Finally, NECTA's implied threat to boycott RLEC territories rings hollow. In an attempt to demonstrate the history of "burdensome" proceeding, NECTA has actually undermined its argument by listing three proceedings,[27] each and every one of which concluded successfully for the CLEC and which, judging by their repeated and continuing efforts, the CLEC community obviously considered worthwhile and productive endeavors.

IV. RSA 374:22-g AND THE STIPLATED PROCEDURES ARE CONSISTENT WITH LEGISLATIVE POLICY MANIFESTED IN THE RELEVANT STATUTES.

NECTA devotes a section of its brief to discussing the policy issues related to competition that it believes support preemption of the stipulated procedures. As the RLECs discussed in their Initial Brief, competition policy is not an issue here. Both Congress and the General Court have manifested a pro-competitive policy in their respective legislation. The particular issue in this proceeding is not whether telephone competition is a public good; it is whether the General Court's implementation of that policy is consistent with federal law.

In reiterating the benefits of competition, NECTA concedes that carrier of last resort obligations are a Commission concern, but brushes them off with the vague and unexplained claim that "the availability of alternate rate regulation ensures that the provision of universal

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[25] *Id.* at 8.
[26] Meredith Direct at 11:18-20.
[27] NECTA Brief at 10-11.

service to achieve the carrier of last resort obligations."[28] NECTA's support for this *non sequitur* is an observation by the Commission in the Order approving the Union Telephone - MetroCast stipulation that alternative regulation plans are "required to contain terms meant to ensure its continued provision of universal service as the carrier of last resort."[29] However, the Commission was only observing that fulfillment of these obligations is a *condition* of alternative regulation, not that they are necessarily a *result*. Furthermore, this would only pertain to carriers like Union who believe that their operations can remain viable under alternative regulation in the face of unconditional competitive entry. However, none of the RLEC petitioners have made this claim or have indicated that they would seek alternative regulation.

While paying lip service to the carrier of last resort issue, NECTA has offered no constructive suggestion as to how this issue can be reconciled with the entry of unconditional competition. Instead, it tries to disassociate the issue of CLEC entry from the factors in RSA 374:22-g with vague suggestions of various types of *post hoc* remedies that show no promise of addressing the 374:22-g factors until long after the damage has been done. "Legitimate RLEC concerns can be addressed in dockets such as alternative rate regulation requests or service investigations or rulemaking proceedings and not in the individual case-by-case process by which each CLEC requests a finding granting it leave to enter the territory of each RLEC."[30] In the direct testimony of its witness, Dr. Pelcovits, NECTA also made an oblique reference to possibility of a state universal fund, but it has not explained how that could possibly happen in the current political and economic climate. It is also interesting to note that not only has NECTA failed to explain how universal service can be maintained, it has assiduously avoided any

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[28] *Id.* at 20.
[29] MetroCast Cablevision of New Hampshire, LLC, DT 08-130, Order No.25,193 at 6 (Jan, 18, 2011).
[30] NECTA Brief at 21.

intimation that its members are at all interested in assuming the RLECs' carrier of last resort obligations.

For its part, segTEL ignores the issue of universal service altogether. It asserts that the "public good standard "is both impermissibly vague and irrelevant to the ability of a competitor to provide utility service,"[31] notwithstanding years of case law that define the public good generally and RSA 374:22-g, which prescribes specific factors. segTEL further explains, incongruously, that while "the policy consideration of 'carrier of last resort obligations' . . . is of interest to the Commission and to the state, they are not an element that can permissibly be considered in the determination of whether a utility may provide 'any interstate or intrastate telecommunications service.'"[32] It is revealing that segTEL conveniently ignores all of Section 253(b), which does provide "the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance *universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers*." (emphasis supplied).

If the Commission is going to consider policy issues at all in this proceeding, the RLECs respectfully suggest that it focus its inquiry on those policies that are manifested in Section 253 and RSA 374:22-g as they relate to the advancement of universal service and safeguarding the rights of consumers. If the Commission fails to adequately level the playing field and forces RLECs to maintain universal service and carrier of last resort obligations in the face of largely unregulated competitors who have unconditional operating authority, it will undermine the viability of the RLECs and cede the market to competitors who could in turn establish

[31] segTEL Brief at 6.
[32] *Id.* at 12.

themselves as the new dominant carriers – only without the universal service and carrier of last resort obligations of the incumbent RLECs.

V. CONCLUSION

RSA 374:22-g is entirely consistent with the policy goals of the Telecommunications Act and the provisions of Section 253 of that Act. The RLECs respectfully request this Commission find that RSA 374:22-g is not preempted by any federal statute, and to declare null and void, or rescind, any CLEC authorization, granted pursuant to a Rule Puc 431.01 Form 10 registration, to engage in business as a telephone utility within the service territories of the RLECs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing initial brief was forwarded this day to the parties by electronic mail.

Dated: February 25, 2011

By: _____
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