

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

DT 08-013

**Comcast Phone of New Hampshire, LLC**

**Request for Authority to Provide  
Local Telecommunications Services**

**Joint Brief of New Hampshire Telephone Association, Merrimack County Telephone  
Company and Kearsarge Telephone Company**

NOW COME New Hampshire Telephone Association, a New Hampshire voluntary corporation having its principal office at 600 South Stark Highway, Weare, New Hampshire (“NHTA”)<sup>1</sup>, Merrimack County Telephone Company, a New Hampshire corporation and a public utility operating pursuant to the jurisdiction of this Commission (“MCT”), and Kearsarge Telephone Company, a New Hampshire corporation and a public utility operating pursuant to the jurisdiction of this Commission (“KTC”, and with MCT collectively the “TDS Companies”) pursuant to the Secretarial Letter dated June 11, 2008, and hereby jointly submit their Initial Brief in the above captioned docket (this “Docket”). In support thereof, NHTA and the TDS Companies (sometimes referred to hereinafter collectively as the RLEC Representatives”) jointly state as follows:

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<sup>1</sup> NHTA is an association of small incumbent local exchange carriers operating in New Hampshire. NHTA’s members include Granite State Telephone, Inc., MCT, KTC, Wilton Telephone Company, Inc., Hollis Telephone Company, Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc., and Dixville Telephone Company.

## I. INTRODUCTION & PROCEDURAL BACKGROUND

This Docket arose out of the filing by Comcast Phone of New Hampshire, LLC (“Comcast Phone”) of a Form CLEC-10 Application for Registration with this Commission on or about December 12, 2007 (the “CLEC-10 Application”) and the resulting pleadings filed separately on behalf of NHTA and the TDS Companies. Through the CLEC-10 Application, Comcast Phone sought authority to provide some sort of service in multiple towns currently served by the TDS Companies. In summary, this Commission issued an Order *Nisi*, dated April 4, 2008, granting Comcast Phone’s CLEC-10 Application. As stated by the Commission, this Docket “...is the first request for CLEC authorization to operate in a service territory in New Hampshire other than the former Verizon [New England Inc.] territory now served by FairPoint [Northern New England Telephone Operations LLC, d/b/a FairPoint Communications - NNE]” *See Order Nisi*, at p. 1. In response, the TDS Companies filed a Motion to Suspend [the Order *Nisi*] or, Alternatively, for a Hearing, dated April 16, 2008.<sup>2</sup> Shortly thereafter, on April 21, 2008, NHTA filed an Objection to Order *Nisi* and Request for Hearing.

In response to the pleadings filed by RLEC Representatives, the Commission suspended the Order *Nisi* via Order No. 24,854, dated May 2, 2008, and scheduled a hearing for May 21, 2008. After the hearing, wherein the Commission granted several petitions to intervene in this Docket, the parties held a technical session and agreed to the procedural schedule set forth in the above referenced Secretarial Letter. Comcast Phone thereafter filed a Supplement to the CLEC-10 Application (the “Supplemental Material”) in which Comcast Phone further explained the

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<sup>2</sup> Originally, the “TDS Companies” consisted of MCT, KTC, Wilton Telephone Company, Inc. (“WTC”) and Hollis Telephone Company (“HTC”). In light of the Commission issuing Order No. 24,852 in Docket DT 07-027 (the “AFOR Order”) and approving the amended plans for an alternative form of regulation (the “Plans”) for WTC and HTC, these two entities have determined to exercise the authority granted by the AFOR Order and implement the Plans. Based on undertakings contained in the Plans, WTC and HTC do not join in the filing of this Initial Brief.

services it “currently intend[ed]” to offer in the service territory of the TDS Companies. Following a second technical session held on June 12, 2008, the parties to this Docket reached an agreed upon set of “Stipulated Facts”.

The Commission’s Staff submitted the agreed upon Stipulated Facts via correspondence dated June 18, 2008. Thus, the record evidence in this Docket is limited - by Comcast Phone’s own admission and agreement - to the CLEC-10 Application, the Supplemental Material and the Stipulated Facts. There is no other record evidence from which this Commission can make a determination on whether or not to approve of Comcast Phone’s CLEC-10, as modified by the Supplemental Material.

## **II. ISSUE PRESENTED**

The sole issue to be decided in this Docket is whether Comcast Phone met its burden in fulfilling all of the requirements to become certified as a competitive local exchange carrier (a “CLEC”) in the service territories listed within the CLEC-10 Application. The Commission should decide the issue in the negative and refuse to certify Comcast Phone based upon the existing record evidence. In the event the Commission disagrees with the RLEC Representatives assessment, which it should not do based upon the evidence presented, then the Commission should place conditions on the approval of Comcast Phone’s CLEC-10 Application as set forth in this Initial Brief.

## **III. FACTUAL BACKGROUND**

With respect to the alleged telecommunication services to be offered by Comcast Phone, the CLEC-10 Application discloses, in response to Item 3 Service, that Comcast Phone will

provide “Access”, “Exchange Access” and “Interexchange Service”. *See* CLEC-10 Application, at p. 2. These words and phrases, standing alone, do not imply that Comcast Phone would provide anything. Comcast Phone failed to disclose the actual services to be provided pursuant to these terms and never defined these terms in its CLEC-10 Application.<sup>3</sup> However, Comcast Phone attached a Schedule of Rates and Charges (the “Initial Rate Schedule”) to the CLEC-10 Application which purportedly disclosed that Comcast Phone planned to offer “Comcast Digital Phone service” (*see* the Initial Rate Schedule, at the introductory heading, p.1) and Business Local Service, with basic recurring charges set for this business service at \$66.25 per access line per month (*see* the Initial Rate Schedule, at Sec. 2.1.2, p. 6) - a rate which appears to be well above any of the rates charged by incumbent local exchange carriers operating in the State of New Hampshire. Comcast Phone now agrees that it “...has discontinued its circuit switched Residential Local Service marketed as Comcast Digital Phone Service.” *See* Stipulated Facts, # 4.

The Supplemental Material purports to explain the actual services to be provided by Comcast Phone in the TDS Companies’ service territory. Comcast confirmed that it planned to provide Business Local Service at the monthly recurring rate referenced above. *See* Supplemental Material, Attachment A, Schedule of Rates and Charges (the “Updated Rate Schedule”), at Sec. 2.2.1 and 2.2.2, p. 6. Two additional services are disclosed in the Supplemental Material and stipulated within the facts. First, Comcast “plans” to offer Schools and Libraries Network Service (*see* Supplemental Material, para. 2(a), p. 3), which “is planned” to include a circuit switched voice service (*see* Stipulated Facts, # 3). Second, Comcast Phone

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<sup>3</sup> In defining the terms in the Supplemental Material, Comcast Phone simply restates various definitions from the Communications Act of 1934, as amended (the “Act”), rules promulgated by the Federal Communications Commission (the “FCC”) and rules promulgated by this Commission. *See* Supplemental Materials, Para. 1, ps 1-3.

plans to offer Local Interconnection Service (*see id.*, # 5). *See also* Supplemental Material, Sec 2(b), ps. 3-4. Comcast Phone stipulated, however, that Local Interconnection Service is a wholesale service and that Comcast Phone “...is not relying on Local Interconnection Service for CLEC certification in New Hampshire.” *See* Stipulated Facts, # 5-6.

#### IV. ARGUMENT

##### A. Comcast Phone bears the burden of proving that its CLEC-10 Application meets the legal standards necessary for approval by this Commission.

New Hampshire law authorizes the Commission to grant Comcast Phone’s CLEC-10 Application only if it is for the public good, “and not otherwise”. *See* RSA 374:26. Specifically, RSA 374:26 precludes the commencement of service unless, “after due hearing,” the Commission finds “that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good . . . and [the Commission] may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest.” RSA 374:26. *See also* Order Approving Settlement Agreement with Conditions, Order No. 24,823, DT 07-011, Verizon New England et al., February 25, 2008. In this Docket, Comcast Phone bears the burden of proving that its application is complete and the granting of the requested relief is for the public good. *See* Puc 203.25 (noting that the “...party seeking relief through a petition, *application*, motion or compliant shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence) (emphasis added).

**B. Based upon the record evidence, Comcast Phone can not meet its burden of proving under these circumstances that (i) it satisfied the requirements to become certified in the service territory of the TDS Companies and (ii) such certification is in the “public good”.**

This Commission has established administrative rules concerning the registration of CLECs. The administrative rules are straightforward and clear. The purpose of the CLEC registration rules are “...to establish *standard procedures*, general business rules, and guidelines for CLECs in order to enable CLECs to provide competitive telecommunications services *and to comply* with relevant statutes and commission orders.” See Puc 430.01 (emphasis added).

The applicable administrative rules at issue in this Docket are as follows and reproduced in relevant part below. The administrative rules state:

Puc 449.07 Form CLEC-10 Application for Registration.

(d) The applicant shall list 3 primary telecommunications services the applicant will offer in New Hampshire.

(l) The applicant shall include a sworn and notarized attestation that states that the application and its attachments are complete, true and accurate, and fairly represent the applicant and its qualifications.

In deciding whether Comcast Phone complied with the applicable administrative rules, the Commission first should ascribe the plain and ordinary meanings to the words used in the administrative rules. See *Great Traditions Home Builders, Inc. v. O’Connor*, -- A.2d --, 2008 WL 2389235, at p. 1, (N.H. June 13, 2008) citing *Cayten v. N.H. Dep’t of Envtl. Servs.*, 155 N.H. 647, 653, 927 A.2d 494 (2007)(explaining the general principles of statutory construction). This Commission also should note the use of the word “shall” in Puc 449.07. “Shall” is not permissive. Instead, in this case, the use of the word “shall” makes the provision mandatory. *Id.* at p. 2. See also *In re Bazemore*, 153 N.H. 351, 354, 899 A.2d 225 (N.H. 2006) (interpreting a

statute and holding that it is a general rule of statutory construction that the word “may” is permissive in nature and the word “shall” makes enforcement of a provision mandatory.)

Comcast Phone’s application is not complete. Comcast Phone has not listed three bona fide “telecommunication services” that it “will offer in New Hampshire”. Only two services have been provided - Business Local Service and Schools and Libraries Network Service. The RLEC Representatives do not concede that these services, as described by Comcast Phone’s lawyers during the last technical session, actually qualify as “telecommunications services” as described within the Act. *See* 47 U.S.C. 153(a)(51) (defining a “telecommunications service” as “...the offering of telecommunications for a fee directly to the public...”) and 47 U.S.C. 153(a)(48) (defining “telecommunications” as “...the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent or received.) Nonetheless, the RLEC Representatives concede that it is arguable that the definitions of Business Local Service and Schools and Libraries Network Service, as provided within the Stipulated Facts, meet the definition of a telecommunications service. The RLEC Representatives do not concede, however, that Comcast Phone has any intention to provide these services.

Notwithstanding the above, this Commission’s administrative rules exist for a reason and must be applied equally to all entities seeking to conduct business within a New Hampshire service territory. The rules do not apply to some CLECs more than other CLECs, nor should the rules be interpreted differently for different CLECs. Comcast Phone has not described three telecommunications services that it will provide in New Hampshire. The record evidence demonstrates that only two services potentially could be construed as telecommunications services under the Act. Thus, the CLEC-10 Application as submitted does not meet the

requirements for CLEC certification and, therefore, this Commission should deny the request for certification.

The RLEC Representatives submit that Comcast Phone has no intention of providing any “telecommunications services” to residents of the TDS Companies’ service territory and only seeks CLEC certification in order to provide an information based telephone service outside of this Commission’s jurisdiction. It can not be disputed seriously that Comcast Phone provides its Digital Voice Service to residents of FairPoint’s service territory. It also can not be disputed seriously that Comcast Phone and its affiliate provide this service while claiming that the service may not be regulated by this Commission. This Commission’s rules exist for valid reasons and should be enforced in a fair manner.

In addition, inherent in Puc 449.07(d) is the concept that telecommunication services are to be provided to the public. *See also Appeal of Zimmerman*, 141 N.H. 605, 612, 689 A.2d 678 (N.H. 1997) (holding in relevant part that a central inquiry is whether the party purporting to provide service “...offers [the] telecommunications services to the public without discrimination.”) In order to be a provider of a “telecommunications service”, Comcast Phone must make available telecommunications for a fee to the public. *See Puc 402.53* (referring to the Act in general) and 47 U.S.C. 153(a)(48) and (51). No record evidence exists in this docket that Comcast Phone intends to provide a service which meets the requirement of being a “...transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent or received.” Nor is there any record evidence of Comcast Phone providing such a service to the public. The Commission should not find that Comcast Phone’s statements to the contrary are sufficient for purposes of meeting its burden of proof. Comcast Phone has not (and probably can not) offer

any evidence that members of the public purchased its alleged telecommunications services as listed in the CLEC-10 Application or the Supplemental Material. Written statements that Comcast Phone “plans” to provide such services, such as a “...a circuit switched voice service” (see Stipulated Facts # 3) ring hollow in the face of Comcast Phone’s actions over the years in New Hampshire. Thus, the CLEC-10 Application, as modified by the Supplemental Material, should be rejected.

Nothing in the Federal Communications Commission’s decision released June 23, 2008, in connection with File No. EB-08-MD-002 changes these facts. See *In RE: Bright House Networks, LLC et al. v. Verizon California et al.*, Memorandum Opinion and Order, File No. EB-08-MD-002, FCC 08-159, released June 23, 2008. In *Bright House*, the FCC clearly limited the order to the facts of the case and the need for the specified relief under Section 222(d) of the Act. See *id.*, at para. 41, p. 16. See also Statement of Commissioner Copps, released via Erratum on June 24, 2008 (noting that the FCC issued the *Bright House* decision in a restricted proceeding and that such a forum “...most assuredly is not the right venue for interpreting a statutory term in a way that carries broader implications for the public and other stakeholders not represented in this proceeding”). Thus, *Bright House* has no application to the present Docket.

**C. In the event the Commission disagrees with the RLEC Representatives analysis of the evidence in this Docket, then the Commission ought to impose conditions on Comcast Phone in order to ensure a fair and level regulatory environment.**

As explained above, the RLEC Representatives are not convinced that Comcast Phone intends to provide any telecommunications services to the residents of the TDS Companies’ service territories. In the event the Commission disagrees with the RLEC Representatives analysis of the evidence in this Docket, which the RLEC Representatives respectfully submit should not be the case, then the Commission ought to impose conditions on Comcast Phone in

order to ensure a fair and level regulatory environment. New Hampshire law provides for this concept. RSA 374:26 specifies that the Commission "...may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest." The RLEC Representatives respectfully recommend that the following conditions are appropriate in light of the evidence presented:

1. Comcast Phone should be required to complete a new CLEC-10 Application form incorporating all of the services and representations made by Comcast Phone in this Docket. The new application must be signed under oath by a designated officer of Comcast Phone wherein the officer certifies that Comcast Phone will provide the telecommunications services listed therein.

2. On a highly confidential basis, and to the exclusion of all other parties to this Docket, Comcast Phone should be required to submit its business plan to the Commission in order to allow the Commission to verify the representations submitted under oath via the CLEC-10 Application and the representations made by Comcast Phone in the Stipulated Facts. For example, Comcast Phone represented in part that it "planned" to provide a circuit switched voice service as part of its Schools and Libraries Service. The Commission ought to be assured that the representation is accurate. Comcast Phone's parent entity, Comcast Corporation, is a multi billion dollar entity (*see* Comcast Corporation's financial information at:

<http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1138015&highlight=>). The RLEC Representatives submit that such a sophisticated entity is unlikely to claim to the public and its investors that it plans to undertake the provision of a service absent a well founded business plan. As such, the Commission and the Commission's Staff (and only the Commission and its Staff) ought to be provided with this plan to ensure the veracity of the claims made in this Docket.

3. Until and unless the FCC rules on the Petition for Declaratory Ruling Whether Voice Over Internet Protocol Services are Entitled to Interconnection Rights of Telecommunications Carriers, WC Docket No. 08-056, or otherwise clarifies current law concerning the proper scope of regulating VoIP based service providers, this Commission immediately should open a generic docket investigating, among other issues whether: (i) Comcast Phone and other VoIP based service providers actually provide (X) telecommunications services (Y) to the public for a fee; and (ii) if the answer to issue (i) is in the affirmative, then whether such providers are subject to regulation by this Commission; and (iii) if the answer to issue (ii) also is in the affirmative, how this Commission should regulate these providers.<sup>4</sup>

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<sup>4</sup> The RLEC Representatives submit that the generic docket ought to be opened even if the Commission denies Comcast Phone's present petition/request for CLEC certification.

**V. CONCLUSION**

The RLEC Representatives submit that Comcast Phone has failed to meet its burden of proving its compliance with applicable rules and law related to its CLEC-10 Application. The Commission therefore should deny the application. In the event the Commission disagrees, then the Commission's approval of the CLEC-10 should be subject to the conditions hereinbefore stated.

Respectfully submitted,

NEW HAMPSHIRE TELEPHONE  
ASSOCIATION

MERRIMACK COUNTY TELEPHONE  
COMPANY

KEARSARGE TELEPHONE COMPANY

By Its Attorneys,

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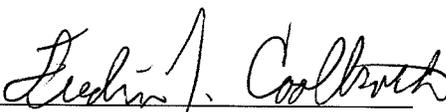
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**CERTIFICATE OF SERVICE**

I hereby certify that a PDF copy of the foregoing Initial Brief was forwarded this day to the parties by electronic mail.

Dated: June 26, 2008

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