

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”)¹, 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 Commission’s Order No. , 24,887, dated August 18, 2008 (the “August Order”), 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:

¹ 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 telecommunications service in multiple towns currently served by the TDS Companies. In summary, while this Commission issued an Order *Nisi*, dated April 4, 2008, initially granting Comcast Phone’s CLEC-10 Application, the Commission later rescinded the Order *Nisi* via Order No. 24,854, dated May 2, 2008, and scheduled various proceedings related to Comcast Phone’s application. Comcast Phone later filed a Supplement to the CLEC-10 Application on or about May 29, 2008 (the “Supplemental Material”) in which Comcast Phone further explained the services it “currently intend[ed]” to offer in the service territory of the TDS Companies. Following a technical session held on June 12, 2008, the parties to this Docket reached an agreed upon set of “Stipulated Facts”.

In lieu of a prior scheduled evidentiary hearing, the parties and the Commission’s Staff agreed to proceed via the submissions filed to date. In addition to the stipulated facts, the RLEC Representatives submitted evidence via the pre-filed testimony of Ms. Valerie Wimer, the Director New Business Development for John Staurulakis, Inc. (“JSI”). Comcast Phone submitted pre-filed testimony from Mr. David Kowolenko, Comcast Phone’s Vice President for Voice Services, and Dr. Michael Pelcovits, of Microeconomic Consulting and Research Associates. No other parties submitted pre-filed testimony or other evidence.

II. ISSUE PRESENTED

The sole issue to be decided in this Docket is whether Comcast Phone met its burden of proving that the granting of its CLEC-10 Application and allowing Comcast Phone to provide service in the TDS Companies' service territory would be in the "public good" pursuant to RSA 374:22-g and RSA 374:26. Based upon the evidence presented, the Commission should determine that the regulatory scheme applicable to the TDS Companies does not afford the opportunity for fair and equitable competition, and approval of the CLEC-10 Application is not in the public good. In the alternative, the Commission should approve of the CLEC-10 Application on a limited basis, and further should place conditions on the approval of Comcast Phone's provisioning of services in the TDS Companies' service territory. Comcast Phone's authority to provision services in the TDS Companies' service territory, if permitted at all, should be limited to the provisioning of its Schools and Library Service and resold business local service.

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. 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; *see also* Pre-filed Testimony of Mr. Kowolenko at p. 4.2-4.

The Supplemental Material filed by Comcast Phone purports to explain the actual services to be provided by Comcast Phone in the TDS Companies' service territory. Comcast Phone confirmed that it planned to provide resold 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, and 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). The Commission accepted these representations and stated, in relevant part:

Comcast's initial application lists three telecommunications services and Comcast has demonstrated that those three services will be offered through two specific retail telecommunications offerings. Since Comcast is already offering one of its proposed services, the local business service, in other parts of New Hampshire, we accept Comcast's representation that its CLEC-10 describes services that will be offered in the TDS territory. Issues regarding whether and when Comcast offers retail telecommunications service to TDS customers are matters of enforcement.

The question of whether Comcast IP's new digital voice service is a regulated telephone service is an important regulatory issue. As we noted at the prehearing conference, however, the regulatory status of Comcast IP's digital voice service is not the subject of this docket and does not bear on whether we should expand Comcast's authority to operate in New Hampshire. **This is because Comcast has represented that it will provide other retail telephone services that qualify it for CLEC registration in the TDS franchise area.**

See August Order, at p. 6 (emphasis added).²

The pre-filed testimony of Mr. Kowolenko and Dr. Pelcovits, however, emphasize and state with clarity Comcast Phone's intent to provide its digital voice product through Comcast IP Phone II, LLC ("Comcast IP"). According to Mr. Kowolenko, Comcast Phone provides Comcast IP local interconnection service ("LIS") to serve New Hampshire residential customers with an interconnected voice over internet protocol ("VoIP") based product. *See* Pre-filed Testimony of Mr. Kowolenko at ps. 3.17-24 and 4.1-2. Approving of the CLEC-10 Application will allow Comcast Phone "...to offer a full array of voice, video, and data service to retail customers and provide residents in the TDS service areas with a full array of competitive choices." *See* Pre-filed Testimony of Mr. Kowolenko at p. 7.17-20. Dr. Pelcovits' pre-filed testimony is consistent with Mr. Kowolenko's testimony. Dr. Pelcovits noted that the granting of the CLEC-10 application "...would facilitate Comcast [Phone]'s ability to offer the triple play in the service territories..." of the TDS Companies. *See* Pre-filed Testimony of Dr. Pelcovits at p. 10.9-13.

On behalf of Comcast Phone, only Dr. Pelcovits offered testimony addressing the effects of competition on TDS Companies. According to Dr. Pelcovits, the entry of Comcast Phone into the TDS Companies' market will not impact their ability to offer universal service and continue with their carrier of last resort obligations. *See* Pre-filed Testimony of Dr. Pelcovits at p. 12. Dr. Pelcovits concludes that "clearly" the TDS Companies have "come to grips" with competition. *Id.* at p.12.16-18.

Ms. Wimer's pre-filed testimony addresses several issues in her analysis of the "public good" standard. Ms. Wimer explained that Comcast Phone's requested authorization does not

² The RLEC Representatives point out that Comcast Phone failed to provide any evidence that it sought or secured a single customer for its business local service. Such representations, therefore, should not go

meet the fairness criteria. *See* Pre-filed Testimony of Ms. Wimer at ps. 7-8. Ms. Wimer explained how the regulatory burden on the TDS Companies does not permit the TDS Companies to compete fairly with a currently unregulated Comcast Phone. *Id.* at p. 8.7-13, p. 9.13-21, and p.10.6-10. Ms. Wimer also explained how the CLEC Application really was intended to facilitate the provisioning of the VoIP product to residential customers who live within the TDS Companies service territories. *See* Pre-filed Testimony of Ms. Wimer at ps. 10-12. For these reasons, Ms. Wimer concludes that, in her professional opinion, approving of Comcast Phone's CLEC-10 Application is not in the public good. *Id.* at ps. 4.1-7, and 15.13-14.

Notwithstanding the above conclusion, Ms. Wimer recommended a compromise to the Commission. According to Ms. Wimer, the Commission should limit the approval of the CLEC-10 Application to those services Comcast Phone has represented to the Commission that it intends to offer. *Id.* at p.15.12-21. That is, in the event the Commission concludes, that approval of the CLEC-10 Application is for the public good, then the Commission should limit Comcast Phone's authority to conduct business in the TDS Companies' service territory to providing Business Local Service and Schools and Libraries Exchange Service. *See* Pre-filed Testimony of Ms. Wimer at ps. 15-16.

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

without scrutiny.

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 (emphasis added). *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 complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence) (emphasis added).

The analysis is not limited to issues related to competition. Rather, many factors must be considered prior to granting the relief sought by Comcast Phone in this Docket. In determining the “public good”, the Commission must “...consider the interests of competition with other factors including, but not limited to, fairness; economic efficiency; universal service; carrier of last resort obligations; the incumbent utility's opportunity to realize a reasonable return on its investment; and the recovery from competitive providers of expenses incurred by the incumbent utility to benefit competitive providers, taking into account the proportionate benefit or savings, if any, derived by the incumbent as a result of incurring such expenses.” RSA 374:22-g. Thus, considering the applicable law in its totality, Comcast Phone must prove by a preponderance of the evidence that its entry into the TDS Companies’ service territory would promote “free and fair competition” (*see* Part II, Article 83 of the New Hampshire Constitution) considering at least all of the factors listed by the legislature within RSA 374:22-g(II).

Comcast Phone can not meet its burden of proof. Mr. Kowolenko’s testimony does not address the factors listed in RSA 374:22-g. In fact, Mr. Kowolenko never even used the words

“public good” in his pre-filed testimony. While the RLEC Representatives do not consider this fact to be conclusive, it is indicative of Comcast Phone’s failure to consider the applicable statutory and regulatory scheme governing the Commission’s analysis.

Dr. Pelcovits’ pre-filed testimony references the correct legal standards, but focuses in large part on the effects of competition in a free market system. *See ex.* Pre-filed Testimony of Dr. Pelcovits at ps 6-8. For example, Dr. Pelcovits testified that competition “...compels firms to produce the goods that consumers demand and to produce them as efficiently as possible. *Id.* at p. 6.8-9. The RLEC Representatives agree with these large scale, grandiose statements.

The RLEC representatives welcome competition on a fair and level playing field. In fact, Part II, Article 83 of the New Hampshire Constitution is on point in this regard. It states, in relevant part (emphasis added):

Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof.

Yet the concept of **free and fair** competition is the consideration that Dr. Pelcovits avoided. Dr. Pelcovits’ analysis should be rejected by the Commission as it suffers from multiple deficiencies. Dr. Pelcovits does not assess how allowing Comcast Phone to provide products on a completely unregulated basis constitutes “free and fair competition” against heavily regulated rural local exchange carriers, such as MCT and KTC. In addressing issues related to universal service and carrier of last resort, Dr. Pelcovitis selectively utilized two (2) quotes - one quote from a press release and one quote from a witness in the TDS Companies’ alternative regulation docket, Docket DT 07-027 (the “AFOR Docket”). *See* Pre filed Testimony of Dr. Pelcovits at p. 12.8-16. Dr. Pelcovits uses these quotes and leaps to the conclusion that

the TDS Companies “. . . do not foresee a problem in meeting their historic provider of last resort responsibilities.” *Id.* at p. 12.17-18. Dr. Pelcovits also uses the two (2) quotes to conclude that there “is no reason to believe” that the TDS Companies can not continue to serve as the carrier of last resort. *Id.* at p. 12.1-2. Such reasoning does not support a determination that Comcast Phone’s proposed operation in the TDS Companies’ service territory qualifies as “free and fair” competition.

In addressing the factor related to recovery of expenses, Dr. Pelcovits limits his analysis to interconnection and the reciprocal charges among an incumbent local exchange carrier and the competitive carrier. Furthermore, according to Dr. Pelcovits, the fact that the TDS Companies agreed to interconnection in Vermont is the basis for approval of the CLEC-10 Application in New Hampshire. *See* Prefiled Testimony of Dr. Pelcovits at ps 14-15.

The Commission should reject this reasoning as flawed and not applicable to the present regulatory scheme imposed on the TDS Companies. First, the Commission has no evidence tending to demonstrate that facts and circumstances in Vermont have relevance to proceedings in New Hampshire. Interconnection in Vermont does not constitute evidence of what the form of interconnection might be in New Hampshire between the TDS Companies and Comcast Phone. Second, selectively utilizing one quote from the AFOR Docket - a docket with extensive evidentiary submissions - is not an analysis at all. Adding a quote from a press release does not alter the quality of the evidence offered through Dr. Pelcovits. In summary, the Commission should reject Dr. Pelcovits’ conclusions.

Ms. Wimer provided the better reasoned analysis. Ms. Wimer reviewed the regulatory environment which governs the TDS Companies’ operations and addresses factors related to competition, fairness, carrier of last resort obligations, economic considerations and return on

investment. Ms. Wimer notes that the pricing rules, reporting rules and other regulatory requirements disadvantage KTC and MCT when trying to compete with a completely unregulated entity. See Pre-filed Testimony of Ms. Wimer at ps. 7.8-12 (noting that the regulatory playing field would be skewed in the extreme under Comcast Phone's plan to provide its VoIP based product) and 8.9-12 (requiring KTC and MCT, but not Comcast Phone, to adhere to all of the regulations which benefit consumers heavily favors a non-regulated Comcast Phone). In addition, Ms. Wimer points out that Comcast Phone, or its affiliates, have a well established customer base through its incumbent network. When customers leave the TDS Companies, costs per customer rise. Yet the "...responsibility for providing universal service and serving as the carrier of last resort are unchanged." While some costs may decrease due to access line losses, ILECs such as KTC and MCT must continue to provide service to all customer locations. See Pre-filed Testimony of Ms. Wimer at ps. 9-10. As further examples of the lack of fair competition, Ms. Wimer explained that:

Comcast is not required to offer equal access to all IXCs for toll service which, even under alternative regulation, MCT and KTC are required to provide. In addition, MCT and KTC are required to provide Lifeline and Link-up services.

Id. at p. 10.6-10.

Consequently, Ms. Wimer concludes that the granting of Comcast Phone's CLEC-10 Application is not in the public good. Absent the Commission providing a level regulatory playing field and allowing "fair competition", the evidence does not support a "...determin[ation that] the Comcast proposal will be fair, promote efficiency, promote universal service and allow the ILEC to obtain a reasonable rate of return." *Id.* at p. 7.15-17. See also *Time Warner Cable Information Services (South Carolina) LLC v. Public Service Commission of South Carolina*, 660 S.E.2d 497, 499-500 (S.C. 2008) (South Carolina Supreme Court affirming the denial of

Time Warner's proposed expansion into an ILEC service territory based upon testimony demonstrating that the proposed expansion would have an adverse impact on the affordability of rural telephone service).

B. In the event the Commission determines that the approval of Comcast Phone's CLEC-10 Application is in the "public good", then the Commission ought to impose conditions and limitations on the provision of service consistent with the application.

As noted above, RSA 374:26 precludes the commencement of service unless 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." Thus, the Commission may impose conditions on Comcast Phone in the event the Commission finds that approving of the CLEC-10 Application is in the public good.

As suggested by Ms. Wimer:

"I recommend a fair and equitable compromise. Although, the CLEC-10 application as it stands does not meet the public good criteria described above, a possible compromise would be to limit the approval to the specific services listed in the application (Business Local Service and Schools and Libraries Exchange Service). In limiting the services to those listed in the CLEC-10, no interconnection trunks or porting will be required of MCT and KTC until such time as Comcast wins a schools and libraries customer in the respective Company's service territory. Since schools and libraries services are accomplished via a public bidding process, all the parties will know when the interconnection trunks may be required. No porting or interconnection is required for a resold business service."

See Pre-filed Testimony of Ms. Wimer at ps. 15.12-21 - 16.1-2. The Commission then should undertake and initiate a comprehensive docket to address the regulatory framework applicable to Comcast Phone and Comcast IP's VoIP product. *Id.* at p. 16.2-7. This approach provides

Comcast Phone with exactly what it asked for - the ability to provision resold business local service and Schools and Libraries Exchange Service - and does not provide Comcast Phone with an unfair competitive advantage over the TDS Companies.

V. CONCLUSION

The RLEC Representatives submit that Comcast Phone has failed to meet its burden of proving that its expansion into the TDS Companies' service territory as proposed within the CLEC-10 Application is for the "public good". 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 and as explained by Ms. Wimer.

Respectfully submitted,

NEW HAMPSHIRE TELEPHONE
ASSOCIATION

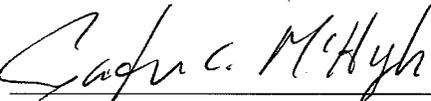
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CERTIFICATE OF SERVICE

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

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