

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

RE: Comcast Phone of New Hampshire, LLC)
Request for Authority)

Docket No. DT 08-013

**INITIAL BRIEF
OF
UNION TELEPHONE COMPANY**

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INTRODUCTION AND SUMMARY

Union Telephone Company d/b/a Union Communications (“Union”) is an intervenor in this Docket. Union is a small Incumbent Local Exchange Carrier (“ILEC”) with less than 10,000 access lines. Union is active herein due to its concern over the reasonable and lawful treatment of small ILECs and the potentially precedent setting nature of this case – the first New Hampshire case involving the request for Competitive Local Exchange Authority in a geographic area other than the one served by a Bell Operating Company as defined at 47 U.S.C. § 153(4).

Union respectfully submits that the evidence presented by the Petitioner, Comcast Phone of New Hampshire, LLC (“Comcast” or “Petitioner”) in this case is not sufficient to grant the authority requested by Comcast. The evidence presented does not adequately address the factors required under the standard in the applicable New Hampshire statute - - RSA 374:22-g. Thus, based upon the record it has before it, the Commission has no choice but to deny Petitioner’s request.

PROCEDURAL BACKGROUND

This case involves the petition by Comcast for authority to provide local telecommunications services in the service territories of three ILECs – each of which the Commission has identified as having less than 25,000 access lines. The Commission initially granted Comcast’s petition via Order *nisi* dated April 4, 2008, but subsequently suspended that grant via Order dated May 2, 2008. The basic facts set forth in the petition, as described by the Commission’s May 2, 2008 Order, are supplemented by the Stipulation of Facts submitted by the parties under a Commission Staff letter dated June 18, 2008 and the exhibits admitted pursuant to a Secretary’s letter dated September 22,

2008. Those exhibits consist of the pre-filed testimonies of David J. Kowolenko and Michael D. Pelcovits, on behalf of Comcast, and Valerie Wimer, on behalf of the New Hampshire Telephone Association.

This matter was previously briefed prior to the admission of these exhibits. Upon receipt of the prior briefs, the Commission issued an order providing an opportunity to file testimony and scheduling a hearing. DT 08-013, Order No. 24,887, ORDER GRANTING HEARING (August 18, 2008). The Commission cancelled the hearing upon being advised that the parties waived their rights to cross-examine the witnesses.

FACTS

Comcast is a subsidiary of Comcast Corporation. By and through its affiliates, Comcast Corporation provides cable television service, high speed internet services, and telephone service in 39 states and the District of Columbia. Comcast Corporation and its affiliates had revenues of over \$30 billion and profits of over \$2.5 billion in 2007. Kowolenko Testimony, p. 5 and Exhibits C and D thereto.

Comcast states that it intends to offer T-1 services to schools, libraries and other e-rate eligible institutions, single line resold business service, and “wholesale interconnection service.” Kowolenko Testimony, p. 3. The wholesale interconnection service is the service that enables Comcast’s affiliate, Comcast IP Phone, LLC, the ability to provide residential customers with Comcast Digital Voice, an interconnected voice over internet protocol (“VoIP”) service that competes with the basic local telephone service provided by Local Exchange Companies, such as the small ILECs in the service territories relevant to this case. Kowolenko Testimony, p. 4-5 and Exhibit C, p.7.

At the end of 2007, Comcast Corporation's network passed 48.5 million homes, of which 49.6% were video customers, and provided phone service to 4.6 million customers. Kowolenko Testimony, Exhibit C, p.2. By the end of 2008, Comcast Corporation expects to have phased out all of its circuit switched service such that all of its phone service will be digital and 91% of its homes passed will have access to that service. Kowolenko Testimony, p. 4, and Exhibit C, pp. 7, 12. It has already phased out its circuit switched services in New Hampshire. Kowolenko Testimony, p.4.

APPLICABLE LAW

The Commission was created by New Hampshire statute. Administrative agencies, such as the Commission, must act within their delegated powers. *Appeal of Concord Natural Gas Corp*, 121 N.H. 685, 689 (1981); *Kimball v. N.H. Board of Accountancy*, 118 N.H. 567, 568 (1978). Rules and orders adopted by state agencies may not add to, detract for or in any way modify the statutory law. See *Kimball, supra*.

The application for a competitive telephone utility authority, which Comcast seeks in this Docket, is governed by RSA 374:26 and by 374:22-g, which was amended during the pendency of this case. 2008 N.H. Laws 350:1.¹

RSA 374:26 requires that the grant of permission to operate as a public utility be in "the public good, and not otherwise" and explicitly authorizes the Commission to put conditions upon any such authority. RSA 374:22-g, as amended, provides that all telephone franchise areas shall be non-exclusive. It further authorizes the Commission to authorize the provision of service by more than one provider if it is consistent with the public good and not prohibited by federal law. It additionally requires that, prior to

¹ 2008 N.H. Session Laws Chapter 350 was originally known as and referred to in prior briefs in this case as SB 386.

finding the grant of authority to be in the public good, the Commission must consider “the interests of competition” and the following additional factors:

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.

Id.

Cases that involve the legal rights and privileges of parties, such as the rights of the Petitioner and the incumbent utilities in this matter, are contested cases as defined by the New Hampshire Administrative Procedure Act. RSA 541-A:1(IV). Both the requirements of that Act as well as the application of basic due process requirements of the Federal and State constitutions require the Commission’s findings herein, including the findings regarding the factors required by RSA 374:22-g, to be based upon evidence in the record. U.S. Const. Amend. V, XIV; N.H. Const. pt. I, arts. 2, and 14; RSA 541-A:31.²

The Courts and the Commission itself have regularly reiterated this basic requirement of making findings based upon the record before the Commission. *See, e.g. New England Telephone & Telegraph Co. v. State*, 104 N.H. 229, 240 (1962); *Kearsarge Telephone Company, et. al.*, Docket DT 07-027, Order No. 24,885 August 8, 2008)(Commission states that “[w]e must make our determination based upon the record in order to protect all parties' due process rights.”) Consistent therewith, in a case involving an earlier disputed application for competitive telecommunications authority,

² The Commission may also use items that it takes notice of which it provided parties of notice of prior to or during the hearing process. *See*: RSA 541:A-33. No such notices were provided in this case.

the Commission stated: “The PUC must consider all the evidence before it and the PUC's decision must be fairly based upon consideration of all of the relevant factors.” *Re: Long Distance North of New Hampshire, Inc.*, NH PUC Docket DE 87-249, Order No. 19,698 (February 2, 1990).

When the Commission makes its decision based upon the relevant factors and the evidence before it, it must also make findings that are sufficiently articulated for a court to review those findings. *New England Telephone & Telegraph Co.*, at 240. Thus, the Commission’s order in this matter must make explicit findings on all of the factors in RSA 374:22-g based on the evidence before it.

Under the Commissions’ rules, the Petitioner has the burden of proof. Commission Rule PUC 203.05. In *Long Distance North, supra*, the Commission held that a petitioner’s burden of proof involves both the burden to come forward with evidence on the required elements of the case (i.e. to make a *prima facie* case) and also the burden of persuasion. In that case, the Commission Staff took the position that the Commission had the duty to, with the assistance of Staff, to investigate fully the matter to create and have a complete record.

ARGUMENT

I. THE LACK OF EVIDENCE ON FACTORS THE COMMISSION IS REQUIRED TO CONSIDER REQUIRES THE COMMISSION TO DENY THE REQUESTED AUTHORITY.

Comcast has not provided and the Commission does not have before it sufficient evidence to make the requisite findings-of-fact for the following factors that Commission must address pursuant to RSA 374:22-g: “the incumbent utility’s opportunity to realize a reasonable return on its investment,” “carrier of last resort obligations,” and “universal service.” Thus, the Commission may not lawfully grant Comcast the authority requested in this case.

A. There Is Insufficient Evidentiary Basis to Address the Incumbent Utilities’ Opportunity To Realize A Reasonable Return On Its Investment.

RSA 374:22-g requires that “in determining the public good” (the ultimate conclusion required to grant authority), “the commission shall consider”, among other factors, “the incumbent utility’s opportunity to realize a reasonable return on its investment.” To consider this factor, the Commission must have before it evidence specific to the incumbents involved in the geographic areas where competitive operating authority is sought. No such evidence is before the Commission in this case.

The only evidence before the Commission which addresses this issue at all is a statement by Comcast witness Pelcovits, an economist, who declares that “an efficient, well managed market incumbent should be able to respond to competitors and still recover a reasonable return on past and future investment.” Pelcovits Testimony, p. 11. This is a general statement that addresses an entirely hypothetical incumbent. Nowhere in his testimony does the witness address the actual New Hampshire incumbents in

whose service areas Comcast seeks competitive operating authority. Thus, the Commission completely lacks any substantive evidence in this case on “the incumbent utility’s opportunity to realize a reasonable return on its investment” for any of the three incumbent utilities involved.

Moreover, relevant cases in nearby states clearly suggest Comcast’s requested authority, if granted, will have a negative impact on the affected incumbents’ respective opportunities to earn a reasonable return on investment. Earlier this year, the New York Public Service Commission (“PSC”) found that, due to competition, and despite the availability of traditional rate relief mechanisms, the vast majority of the rural ILECs in the State were facing significant competition and were earning well below their authorized rates of return – including many experiencing negative rates of return in 2006 – the last year for which the PSC had data.³ The PSC further found that the 29 rural ILECs in New York facing substantial competition “*lost on average almost 7% of access lines and 15% of minutes of use in 2007 alone.*”⁴ Based on this data, the PSC granted rate relief to several of the incumbents on its own initiative.⁵

Due to the lack of credible evidence in this case, the Commission has no basis or ability to make any findings concerning impact on the incumbent utilities’ opportunity to realize a reasonable return on its investment. The adverse impact of competition in New York, described above, suggests the impact on the opportunity to realize reasonable rates of returns of the incumbent utilities in this case could likewise be adverse. Further, if in

³ NY PSC Case 07-C-0349, In the Matter of Examining a Framework For Regulatory Reform, Order Adopting Framework, p. 14 and Appendix D (March 4, 2008).

⁴ *Id.*, at 3.

⁵ *Id.*, at 2, 13-17.

fact such adverse impact would result, the Commission has no record basis to consider and institute any mitigating remedy, for example, pursuing a state universal service fund, as Maine and Vermont have done,⁶ under RSA 374:22-p.

For the foregoing reasons, New Hampshire law requiring the Commission to make findings-of-fact with respect to the relevant incumbent utilities' opportunity to earn reasonable rates of return in the face of competition from Comcast simply does not allow the Commission to grant the operating authority Comcast seeks in this case.

B. There Is Insufficient Evidentiary Basis to Address the Factors of “Universal Service” and “Carrier of Last Resort Obligations.”

The evidence in this case also fails to adequately address the impact that the proposed entry of Comcast in the relevant geographic areas will have on the “universal service” and “carrier of last resort obligations” factors set forth in RSA 374:22-g. With respect to these factors, Comcast witness Pelcovits offered the following testimony:

The TDS Companies have already acknowledged their ability to serve as the provider of last resort and to preserve universal access to affordable basic service even in the presence of what it characterizes as “competitive wireline, wireless or broadband service available to a majority of the retail customers in each of the exchanges” served by Merrimack County, Kearsarge, Wilton, and Hollis Telephone Companies. Further, as recognized in the testimony of Mr. Michael Reed, Manager of State Government Affairs at TDS, “what is even more important is that significant competition exists at this very moment, and will increase tomorrow.” [footnote omitted] Clearly, the TDS Companies have already had to come to grips with the advent of competition and do not foresee a problem in meeting their historic provider of last resort responsibilities.

This testimony references testimony by TDS witness Michael C. Reed filed March 1, 2007 in a prior case and a press release dated April 29, 2008 as its sources. The referenced testimony was filed at least eight months prior to Comcast’s petition filed in

⁶ Vermont and Maine have found it reasonable to maintain such funds. *See e.g.* 30 V.S.A. § 7523(a), VT PSB Order in Vermont Universal Service Fund Rate for 2008-2009 (July 14, 2008)(available on VT PSB website) ; 35-A M.R.S.A. § 7104, and ME PUC Rules, Chapter 288.

this Docket and thus was not based on the consideration of the application herein. The referenced press release, according to the testimony, addresses the incumbents' owner's status as a Fortune 500 company, and did not consider or address "universal service" and "carrier of last resort obligations" in this territory upon a grant of this application. Since the foregoing testimony by the Comcast witness is not based upon analysis of these factors in consideration of this application for authority, it is either irrelevant or simply fails to meet Comcast's burden of persuasion to address the "universal service" and "carrier of last resort obligations" factors in this case.

Witness Pelcovits also presented data on the Federal High Cost Support Universal Service funds received by the incumbents in 2002 through 2007 and stated that the incumbents will continue to receive such funds. This testimony, while perhaps interesting, fails to address the RSA 374:22-g requirement of showing how "universal service" and "carrier of last resort obligations" will be impacted in this territory if the application for authority is granted. In fact, funding from the Federal High Cost Universal Service Fund is based upon costs and does not increase to respond to loss of revenues due to additional competition. 47 C.F.R. §§ 54.301-54.316. Thus, the funding data and the testimony that the incumbents will continue to receive funding fail to address the statutory standard.

Thus, the lack of sufficient, credible evidence presented by Comcast on the statutory standard of how the factors of "universal service" and "carrier of last resort obligations" would be impacted by the grant of this application leaves the Commission no choice but to deny Comcast the authority requested in this case.

CONCLUSION

This case involves a request for authority to provide competitive landline telecommunications services – including the requirements for a residential VoIP telephone service. In order to grant such authority, the Commission is required by law to consider, among other factors, “the incumbent utility’s opportunity to realize a reasonable return on its investment,” “universal service,” and “carrier of last resort obligations.” The Commission lacks sufficient evidence in the record before to consider these factors and thus has no record basis to grant the authority Comcast seeks in this case. Thus, by law, the Commission must deny the petition before it.

Respectfully submitted,

**UNION TELEPHONE COMPANY d/b/a
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