

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 08-130

METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

Application for Certification as a Competitive Local Exchange Carrier

DT 09-065

IDT AMERICA, CORP.

Application for Certification as a Competitive Local Exchange Carrier

**JOINT STATEMENT OF METROCAST AND IDT
ON PROPOSED FINDINGS OF FACT AND LAW**

Introduction

MetroCast Cablevision of New Hampshire, LLC (“MetroCast”) and IDT America, Corp. (“IDT”) jointly respond as follows to the June 11, 2010 Order Scheduling Prehearing Conference (“Remand Order”). The Remand Order requests the parties to provide input on legal and factual issues to be decided on remand from the New Hampshire Supreme Court (“Court”) in its May 20, 2010 Opinion in Docket Nos. 2009-168 and 2009-432 (“Opinion”).

In order to resolve this matter as expeditiously as possible and to ensure that competitive telephone service can remain available to New Hampshire residents who want to avail themselves of competitive choices, MetroCast and IDT respectfully request that the Public Utilities Commission (“Commission”) make the following findings of fact and law:

Background

1. MetroCast and IDT received authorizations to offer telecommunications services in the Union territory in September 2008 and March 2009, respectively.
2. The Opinion (slip op. at 8) holds that RSA 374:22-g and RSA 374:26 require a notice and hearing process before the Commission may grant a franchise to competitive local exchange carriers, such as MetroCast and IDT, in the territory of a rural incumbent telephone company (“ILEC”).
3. The Opinion (slip op. at 10) remands the appeals to the Commission to determine whether the RSA 374:22-g and RSA 374:26 notice and hearing process, as construed in the Opinion, constitute a federally preempted entry barrier pursuant to 47 U.S.C. § 253.
4. The Commission’s Remand Order (at pp. 1-2) directs the parties to “develop a record sufficient to resolve the federal preemption question...” as well as identify pertinent legal and factual issues.

CLEC Entry Process

5. The record should reflect that, unless RSA 374:22-g and RSA 374:26 are federally preempted, any rural ILEC would be able to impede and adversely affect the provision of telephone competition by insisting on any and all of the following procedures in response to the filing of each CLEC application for registration with the Commission:

- a. Publication of public notice relative to the CLEC application and the nature of applicable Commission review.
 - b. The opportunity for the rural ILEC to offer evidence on any factor listed in RSA:374:22-g that pertained to rural ILECs, including the impact of a CLEC entry on the rural ILEC's ability to earn a return on investment, universal service obligations and the rural ILEC's carrier of last resort obligations.
 - c. The opportunity for a public evidentiary hearing to review and address evidence submitted into the record.
 - d. Findings of fact and conclusions of law by the Commission on all factual and legal issues, whether material or not, pursuant to RSA 363:17-b.
 - e. The opportunity to petition for appeal of an adverse Commission ruling pursuant to RSA 541:1, RSA 541:6 or other applicable appeal statutes.
6. The record should reflect that in addition to those opportunities in ¶ 4 supra, the Commission, in a CLEC application notice and hearing process in rural ILEC territories, also will need to consider any or all of the following as a matter of case management, due process and/or fairness:
- a. An initial procedural conference session.
 - b. An opportunity for discovery on the proposed evidence.

- c. One or more rounds of briefs and/or proposed findings of fact and law.
- 7. The record should reflect that adjudications of CLEC certification requests may take many months to complete, such as the Comcast entry request to TDS territories (about 14 months).
- 8. CLECs applying to serve a rural ILEC territory in New Hampshire following the Opinion will have no assurance that their applications will be granted by the Commission following the required notice and hearing processes under RSA 374:22-g and 374:26.
- 9. The ability of the PUC to deny a CLEC application for any reason enumerated in RSA 374:22-g as affecting rural ILEC operations contrasts with more limited grounds provided by Congress for denial in 47 U.S.C. § 253.

Additional CLEC Interconnection Process

- 10. The record should reflect that in addition to CLEC entry adjudications required by the Opinion, CLECs seeking to serve in rural ILEC territories will need to secure an interconnection or traffic exchange agreement with the rural ILEC.
- 11. The record should reflect that to the extent the CLEC seeks to have the rural ILEC unbundle its network or facilities, the CLEC will need to file a request with the Commission to order unbundling pursuant to 47 U.S.C. § 251(f), which must be completed within 120 days after filing, but the

Commission would then be required to establish an implementation schedule under § 251(f)(1)(B).

12. The record should reflect that even in the absence of an unbundling request, any rural ILEC would be able to impede and adversely affect the provision of telephone competition by choosing not to respond to formal or informal requests from the CLEC to commence interconnection discussions and forcing the CLEC to initiate an arbitration proceeding pursuant to 47 U.S.C. § 252 in the window that consists of the 135th to 160 days after the request to commence talks.
13. The record should reflect that any rural ILEC would be able to impede and adversely affect the provision of telephone competition by aggressively offering arguments that will delay the result until at or close to the three month deadline thereafter for completion of the arbitration, unless extended by agreement of all parties.

Limited Potential Earnings from Rural Entry

14. The record should reflect that CLECs applying to serve a rural ILEC territory in New Hampshire following the Opinion would face a limited population of potential customers -- fewer than 40,000 households and businesses in the territories of New Hampshire's rural ILECs combined and, for each individual rural ILEC territory, typically 2,000 to 8,000 households/businesses, with three small rural ILECs each having fewer than 100 households and businesses.

15. The record should reflect that a rural ILEC is free to offer any service within its region but a potential entrant is subject to the statutory hurdle of a hearing under RSA 374:22 and 374:26 and the hurdle of interconnection discussions/arbitrations simply to become a competitor, let alone supply the market with its service.
16. The record should reflect that even if a right to enter is secured, a CLEC seeking to enter a rural territory would need to offer prices, terms and service sufficient to take customers away from the rural incumbent, with no assurance of marketplace success or that operations ever would earn a profit.
17. The lack of assurances to CLEC returns in entering rural territories contrasts unfavorably with the rural ILEC's right to offer evidence regarding adverse impacts on its return associated with the CLEC entry, and amounts to impermissible discrimination unless this requirement is preempted.
18. The record should reflect that based on some or all of the above regulatory and business impediments, no CLEC attempted to initiate processes to seek entry to serve the territory of a rural ILEC from the start of competition in New Hampshire until the application of Comcast to serve TDS territories filed in December 2008.

Limited Entry Procedures in Nearby States

19. The record before the Commission on remand should reflect that all states near New Hampshire have limited the amount of process on CLEC entry requests, as follows:
 - a. Massachusetts, Rhode Island and Vermont each has adopted nonadjudicatory processes for CLEC entry.
 - b. Maine has an adjudicatory process but does not provide the incumbent with a hearing as of right.
 - c. Connecticut has an adjudicatory process with the incumbent having the right to request a hearing, but the Department has not scheduled hearings on its own motion and incumbents have not exercised a hearing right on CLEC entry requests for many years, if at all.

Findings of Law

20. Based on ¶¶ 1-19 supra, the Commission should find that the notice and hearing requirement applicable to each CLEC request to serve a rural ILEC territory following the Opinion should be preempted as an entry barrier to telecommunications competition in New Hampshire.
21. The record before the Commission on remand should reflect that RSA 374:22 and 374:26 are contrary to 47 U.S.C. § 253(b) because the hearing contemplated under the statutes considers factors – such as the rural

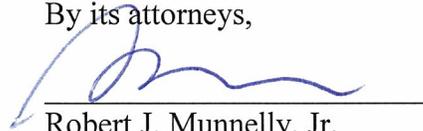
ILECs opportunity to realize a reasonable return on its investment – which exceed the limitations of 47 U.S.C. § 253(b).

22. The record should reflect that rural ILECs are protected from what Congress deemed to be unreasonable obligations to CLECs by not requiring rural ILECs to interconnect pursuant to 47 U.S.C. § 251(f); otherwise, Congress conditioned CLEC entry to a finding of the public good and not on a consideration of the private interest of entrenched competitors.
23. The record should reflect that various adjudicatory bodies have consistently held that no state statute shall prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service and at least one utility commission – Wisconsin’s – has concluded that a hearing requirement for CLEC entry is contrary to 47 U.S.C. § 253(b).
24. The record should reflect that the hearing requirement of RSA 374:22 and 374:26 is preempted by 47 U.S.C. § 253(a) because a hearing requirement creates a substantive and procedural constraint on the ability of a potential competitor to provide local telecommunications service.
25. The record should reflect that delays and costs inherent in an adjudicatory entry process, combined with delays from the interconnection process and costs of launching operations, would have the effect of prohibiting telecommunications services for many months or years, and may prevent competitive entry entirely.

26. The Commission would be constrained under 47 U.S.C. § 253 from providing any relief to a rural ILEC that is seeking to prohibit or delay the entry of a telecommunications service provider seeking to offer competitive choice to New Hampshire residents currently served by such rural ILEC.
27. The finding of preemption under the facts of this case will ensure that residents of New Hampshire living in MetroCast's service area communities have a competitive choice of telecommunications services providers, consistent with the language and intent of 47 U.S.C. § 253.

METROCAST CABLEVISION OF
NEW HAMPSHIRE, LLC

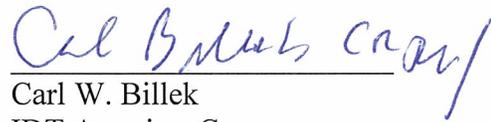
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Date: June 30, 2010