STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NOS. 2009-0168 & 2009-0432 (CONSOLIDATED)

APPEAL OF
UNION TELEPHONE COMPANY d/b/a UNION COMMUNICATIONS

BRIEF OF METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

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QUESTIONS PRESENTED

1. Whether the Public Utilities Commission ("Commission" or "PUC") committed reversible error in responding to a 2008 statutory change that eliminated special competitive entry provisions applicable to territories of rural telephone companies and subjected applicants in rural territories to non-rural telecommunications entry statute in RSA 374:22-g by applying its established non-adjudicative process for entry into non-rural territories to applications from Respondent-Appellees MetroCast Cablevision of New Hampshire, LLC ("MetroCast") and IDT America, Corp. ("IDT").

2. Whether Petitioner-Appellant Union Telephone Company ("Union") possesses legal standing to challenge Commission competitive entry certifications for MetroCast and IDT in its service territory pursuant to RSA 374:22-g as amended in 2008.

RELEVANT LEGAL PROVISIONS

U.S. Const. Amends. V and XIV	Appendix to Union Appeal, p. 57-58
N.H. Constitution, Part I, Arts. 2, 14	Appendix to Union Appeal, p. 60-61
N.H. Constitution, Part II, Art. 83	Appendix to MetroCast Brief, p. 3
RSA 362:2	Appendix to Union Appeal, p. 62
RSA 363:17-b	Appendix to Union Appeal, p. 63
RSA 374:22	Appendix to MetroCast Brief, p. 4
RSA 374:22-e	Appendix to Union Appeal, p. 64
RSA 374:22-g	Appendix to Union Appeal, p. 65
RS 374:26	Appendix to Union Appeal, p. 66
RSA 378:1	Appendix to Union Initial Brief, p. 1
RSA 378:2	Appendix to Union Initial Brief, p. 2

COUNTERSTATEMENT OF CASE

This appeal is critical for MetroCast and IDT and for New Hampshire residents and businesses in territories served by rural incumbent telephone companies ("incumbent local exchange carriers" or "ILECs"). At issue is whether the Commission responded lawfully to recent 2008 legislative changes that (i) repealed a statute that had restricted the ability of competitive local exchange carriers ("CLECs") to serve territories of rural ILECs, and (ii) amended the existing RSA 374:22-g telecommunications entry statute for the non-rural ILEC, FairPoint Communications (f/k/a Verizon) ("FairPoint"), and applied it equally to rural ILECs. See 2008 N.H. Ch. 350 (hereinafter "2008 Act") reproduced in Appendix to Union Initial Brief, pages 8 (text of 2008 Act showing changes to existing law), 24 (text of RSA 374:22-g as amended) (hereinafter A. 8-9, 24). Until these changes took effect, the former RSA 374:22-f[1] had operated to maintain the local services monopoly of New Hampshire's rural ILECs.

MetroCast is an authorized CLEC in FairPoint territory as well as the cable television company for the Union territory. See A. 42.[2] IDT is a CLEC that supports MetroCast with back office services. See IDT-MetroCast Joint Petition for Expedited Relief in the Granting of Numbering Resources, Docket No. DT 06-169, January 26, 2007, Order Approving Settlement Agreement (approving MetroCast-IDT business arrangements affecting telephone number utilization).[3] MetroCast and IDT responded to the 2008 Act by applying to extend their CLEC certifications to include Union's territory. E.g., Appendix to Union Appeal (hereafter "A-

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[1] See 1995 N.H. Ch. 147 reflecting language of repealed RSA 374:22-f reproduced in MetroCast's Appendix to this Initial Brief, at p. 1 (hereafter "A-MetroCast Br. 1").

[2] Union's territory consists of Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham and Strafford. Union Br. at 8.

[3] This decision and other agency orders not reproduced in Appendices filed to date are reproduced at A-MetroCast Br. pp. 8-88.

Appeal") 16-25 (September 19, 2008 MetroCast application). Both MetroCast and IDT followed the Commission's non-adjudicative application and certification process that has governed CLEC applications in FairPoint territory since 2005. See Puc Rule 431.01. The Commission granted both certifications on September 30, 2008 and March 6, 2009, respectively, without a hearing or supporting Order, in the same fashion as its response to CLEC applications in the FairPoint territory. A. 41 (MetroCast certification); A.53 (IDT certification).

Union unsuccessfully sought reconsideration and rehearing of both certifications. See A. 42-52 (MetroCast Application, Docket No. DT 08-130, February 6, 2009, Order) ("MetroCast Order"); A. 54-61 (IDT Application, Docket No. 09-065, May 22, 2009, Order) ("IDT Order") (collectively, "Orders on Rehearing").[4] Each was timely appealed and the appeals were consolidated on July 7, 2009. Union submitted its Initial Brief on October 19, 2009 ("Union Br."). The New Hampshire Telephone Association ("NHTA") submitted an amicus brief and supporting Appendix on the same date ("NHTA Br." and "A-NHTA").[5]

SUMMARY OF ARGUMENT

The Commission reasonably responded to statutory changes in the 2008 Act that eliminated the former RSA 374:22-f special rural entry provisions and amended RSA 374:22-g to encompass CLEC entry into both rural and non-rural ILEC territories, mandates consistency with federal law and displaces inconsistent state law provisions. Consistent with the plain meaning of RSA 374:22-g as amended and, at minimum, a reasonable interpretation of RSA 374:22-g and related telecommunications statutes, the Commission applied to MetroCast and

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[4] The Orders on Rehearing and key statutes are reproduced in the Addendum at the back of this Initial Brief.

[5] Union is not a member of NHTA. NHTA Br. at 1. Subsequent to the filing of this appeal, Union has taken steps to sell its operations and certain assets of affiliated companies to TDS Telecommunications Corporation ("TDS"). TDS, the acquiring party, has not sought leave to participate in the instant appeal.

IDT requests to serve the Union territory its established non-adjudicative certification process that has been in place since 2005 under the former RSA 374:22-g for CLEC requests to serve territories of non-rural ILECs (i.e., FairPoint). Handling the applications using non-adjudicative procedures in Puc Rule 431 comports with both federal law and with the amended RSA 374:22-g applicable to all ILECs, which requires that the Commission "consider" several factors in exercising discretion to authorize entry by one or multiple telecommunications providers into a particular territory upon petition or on its own motion, and does not require an adjudicative hearing or written findings. The Commission's construction of applicable law also reasonably sought to avoid federally proscribed entry barriers at 47 U.S.C. § 253 that would have ensued if the Commission had required adjudicative hearings and written findings for each rural entry application. Sections I.A and I.B (pp. 4-9).

The many statutes, constitutional provisions and rules cited by Union and NHTA, including RSA 363:17-b, 374:22-e, 374:26, 541-A:31 and 541-A:39, fail to provide persuasive support for a mandatory adjudicative proceeding and written findings on rural entry applications following the recent 2008 Act. Union and the amicus, NHTA, ignore that the Commission has employed its non-adjudicative process for entry applications into FairPoint territory since 2005 pursuant to the same authorities. The RSA 374:22-g telecommunications entry "authorization" statute for multiple providers in a service territory does not require an adjudicative proceeding or written findings, and it supersedes the older and generic RSA 374:26 "permission" statute for an individual utility that includes an express hearing requirement. Moreover, Union fails to identify a valid constitutional property interest that would lead to a due process violation and state law does not require the Commission to await completion of a rulemaking proceeding before

accepting on a case-by-case basis the applications filed by MetroCast and IDT under the newly-revised 2008 Act. Section I.C (pp. 9-18).

Finally, Union lacks legal standing to challenge the certification decisions favoring MetroCast and IDT. Union was not a named or admitted party to the agency proceeding and, therefore, lacks legal standing unless it had a legal right to intervene. Given the express provisions permitting multiple entrants into territories of rural carriers under RSA 374:22-g, as amended in the 2008 Act, the potential for increased competition resulting from the certification grants is insufficient to establish a legally cognizable injury. Similarly, Union has failed to identify any direct injury to its status as carrier of last resort as a result of the certifications. If the legislature had intended to provide ILECs with party rights to intervene in CLEC application proceedings, it would have done so in the text of the applicable statutes. Not only did it decline to do so, but it additionally authorized the Commission to grant applications in rural areas "on its own motion." Hence, Union lacks competitor standing sufficient to maintain the instant appeal. Section II (pp. 18-21).

ARGUMENT

I. The Commission Properly Chose a Non-Adjudicative Review of Applications to Serve Telephone Customers in the Union Territory.

A. Introduction and Standard of Review.

In both Orders on Rehearing, the Commission interpreted the 2008 Act and reaffirmed its prior certifications authorizing MetroCast and IDT to provide telecommunications services in the Union territory. The MetroCast certification, as upheld by the Commission, was the first CLEC authorization for any New Hampshire rural area, thereby relieving a monopoly that had denied rural consumers the benefits of telecommunications competition.

Union and NHTA contort statutes and constitutional provisions to claim that the Commission erred in applying to the MetroCast and IDT applications the non-adjudicative Puc Rule 431 process it has used since 2005 in the FairPoint territory. Union's and NHTA's arguments fail to demonstrate reversible error under applicable appellate standards. See RSA 541:13 (standards for appeals and rehearing requests); Appeal of the Office of the Consumer Advocate, 148 N.H. 134, 136 (2002) (appealing party has "burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable...[and when] reviewing agency orders that seek to balance competing economic interests, our responsibility is not to supplant the PUC's balance of interests with one more nearly to our liking.... We give the PUC's policy choices considerable deference") (internal citations omitted); Appeal of Pinetree Power, Inc. & a., 152 N.H. 92, 96 (2004) (requiring "substantial deference" to interpretations of agencies charged with interpreting ambiguous text in statutes they administer).

Given the critical policy issues raised by the Orders on Rehearing and the Commission's central role in evaluating the ambiguous statutes it is charged with implementing, it would be legally and factually inapposite to adopt Union's request for an error of law standard with no deference to the Commission (see Union Br. at 14-15). To the contrary, the Court should uphold the Commission's analysis unless found to be "unjust or unreasonable" in order to prevent months and, likely, years of additional litigation that will delay and, potentially, forestall rural competition. For the reasons discussed below, the Commission's rulings are lawful, just and reasonable.

B. The Commission's Review Comports with Federal and State Law.

The Orders on Rehearing explain how applying the Commission's established non-adjudicative approach comports with federal telecommunications law, recently-amended state

laws and policies supporting telecommunications competition. See Puc Rule 431.01 (establishing non-adjudicative registration process for New Hampshire CLECs); Puc Rule 431.02-.19 (establishing other CLEC requirements).[6] The Commission's rulings are legally sound, within its expertise and discretion, and should be affirmed. See Appeal of the Office of the Consumer Advocate, supra at 136.

The Commission's Orders on Rehearing properly evaluate and reflect consistency with federal law. See RSA 374:22-g (requiring non-exclusive telecommunications franchises "to the extent consistent with federal law...."). The federal prohibition on state and local entry barriers in 47 U.S.C. § 253 is well served by the application of the Commission's streamlined non-adjudicative application process to the MetroCast and IDT applications to serve Union's territory.[7] Moreover, federal law grants Union no entitlement to an adjudicative CLEC process. Both Orders on Rehearing make clear that federal law requires rural carriers and non-rural ILECs to open their networks to competitive providers. A. 47 (MetroCast Order); see 47 U.S.C. §§ 251(a), (b). Federal law requires the State utility commission to "conduct an inquiry" and render a decision whether to terminate the exemption from certain interconnection obligations granted to rural ILECs only if a CLEC makes a bona fide request to use portions of the rural carrier's network on an "unbundled" basis. A. 47 (MetroCast Order); see 47 U.S.C. §§ 251(c), (f) (balancing the benefits of competition against the economic harms when unbundling a rural carrier's network). Union has not been asked to unbundle its network, and therefore no federally-mandated inquiry is required. A. 47 (MetroCast Order); see IDT Petition for an

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[6] The Commission did not issue a rulemaking order accompanying the 2005 re-write of the PUC 400 telephone rules.

[7] See 47 U.S.C. § 253(a). Indeed, Congress gave teeth to this requirement by expressly authorizing the Federal Communications Commission to preempt enforcement of inconsistent state laws and regulations. Id., § 253(d).

Interconnection Agreement, Docket No. DT 09-048, October 7, 2009, Final Order, pp. 18-19 (approving Union-IDT interconnection agreement). A-MetroCast Br. 59.

The Commission reasonably construed New Hampshire law to reach the same result in accordance with its plain meaning and, at minimum, a reasonable interpretation of related telecommunications statutes. The Orders on Rehearing reviewed the recent legislative changes in the 2008 Act eliminating the rural entry restrictions in of RSA 374:22-f and amending RSA 374:22-g to govern entry for all telephone utilities. See A. 47-49 (MetroCast Order). Section 374:22-g now treats "large and small ILECs the same for purposes of competitive entry into their service territories." A. 47 (MetroCast Order). The Commission concluded that pursuant to RSA 374:22-g as amended, "all telephone service territories will be nonexclusive" and it may "authorize multiple telecommunications carriers in any telephone service territory 'to the extent consistent with federal law and notwithstanding any other provision of law to the contrary.' RSA 374:22-g, I." A. 47 (MetroCast Order) (citing statute; emphasis in original). Furthermore, the RSA 374:22-g telecommunication statute does not require a hearing and would govern "notwithstanding any other provision of law to the contrary." A. 47-48 (MetroCast Order) (citing Bel Air Associates v. Dept. of Health and Human Services, 154 N.H. 228, 233 (2006)).

These conclusions fully accord with New Hampshire laws and regulations.[8] Section 374:22-g directs the Commission to "consider" various factors in issuing a certificate in both FairPoint and, following the 2008 Act, rural service territories.[9] Nevertheless, RSA 374:22-g

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[8] See 1995 N.H. Ch.147, A-MetroCast Br. 1 (New Hampshire policy is "to encourage competition for all telecommunications services, including local exchange services, which will promote lower prices, better service, and broader consumer choice for the residents of New Hampshire"); Puc Rule 431 (implementing as of 2005 a non-adjudicative review process without a hearing or formal written findings for applications). Appendix to Union Appeal at 77-78.

[9] The factors consist of competition, fairness, economic efficiency, universal service, carrier of last resort obligations, the ILEC's opportunity to earn a return on investment and possible recovery of expenses by ILECs from CLECs. See RSA 374:22-g, II.

does not require a hearing, adjudicative proceeding or written factual and legal findings relative to these factors. Id. Since 2005, no adjudicative hearing has been conducted and no written findings have been issued under the Puc Rule 431 process for entry to non-rural territories. This belies Union and NHTA claims that a "hearing" and "findings" are preconditions for CLEC entry pursuant to RSA 374:22-g or other statutes.[10]

The Commission concluded that the Puc Rule 431 non-adjudicative process "strikes an appropriate balance" among the RSA 374:22-g factors "regardless of whether the [incumbent's] service territory is large or small." A. 48 (MetroCast Order). These determinations to treat rural ILECs akin to FairPoint for certification purposes are reasonable and consistent with the text and pro-competitive intent of federal and state laws, and should be affirmed. Moreover, federal law "specifically prohibits states from creating barriers to the entry of competition" and requires that state CLEC entry rules (at Puc Rule 431.01) "provide for an administratively efficient process for competitors to enter the local telecommunications market." A. 58 (IDT Order) (citing 47 U.S.C. § 253).[11] The Commission has ample discretion to construe telecommunications statutes to avoid conflicts with the letter and purpose of federal law. See RSA 374:22-g (requiring consistency with federal law and pre-empting inconsistent state laws); cf. Sibson & a. v. State, 110 N.H. 8, 11 (1969) (recognizing principle of construing statutes to avoid constitutional issues); Sinclair Machine Products, Inc. & a. (New Hampshire

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[10] Cf. New Hampshire Retail Grocers Assn. v. State Tax Comm'n., 113 N.H. 511 (1973) (holding that even where a statute has a doubtful meaning, a practical and plausible interpretation by the agency evidences that the administrative construction conforms to legislative intent).

[11] Significantly, subsections (a), (b), (c) and (d) of 47 U.S.C. § 253 all address limitations on state authority and preemption of state or federal regulations.

Public Utilities Commission), 126 N.H. 822-35 (1985) (recognizing same principle for avoiding federal conflicts).

The Commission's concerns about potential entry barriers under the Union and NHTA arguments are well founded from experience. Requiring a time and resource-consuming adjudicative proceeding on every certification request to serve every rural ILEC territory would serve as an entry barrier that would delay, and potentially deny, the benefits of competition to significant portions of New Hampshire's populace, a result contrary to the public policy of the State. See 1995 N.H. Ch. 147. Rural ILECs have availed themselves of every conceivable procedural opportunity to delay and, if possible, frustrate efforts to break up their local service monopolies. [12] The need for an adjudicative hearing and formal written findings under RSA 374:22-g should be left to the Commission's sound discretion.

C. Authorities Cited by Union and NHTA Do Not Require Adjudicative Hearings and Written Findings in Telecommunications Applications.

The array of legal provisions identified by Union and NHTA fail to support their contention that the Commission must conduct an adjudicative hearing and issue written findings on MetroCast's and IDT's applications. Much as Union and NHTA try to ignore these facts in their briefs, the 2008 Act fundamentally changed the playing field by eliminating former differences between entry requirements for rural and non-rural territories. Moreover, the Commission implicitly has construed the applicable statutes to maintain the Puc Rule 431 non-

[12] For example, just to serve approximately seven thousand lines in the Union territory (see Union Br. at 8 n. 2), MetroCast and/or IDT have had to participate actively in three multi-phase administrative proceedings and two appeals. Comcast's efforts to enter the IDT service area under pre-2008 Act statutes similarly took more than a year to obtain certification (with Union's opposing its request as an Intervenor) and another six months to arbitrate over an interconnection agreement clause insisted on by TDS. See Comcast Phone of New Hampshire Application for Authority to Serve Customers in the TDS Service Territories, Docket No. DT 08-013, February 6, 2009 Order Granting Authority (A-MetroCast Br. 15); Comcast Phone of New Hampshire d/b/a Comcast Digital Phone Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS, Docket No. DT 08-162, August 13, 2009, Final Order. (A-MetroCast Br. 38).

adjudicative process for FairPoint territories since 2005 despite the many legal provisions cited in the Union and NHTA Briefs.

1. RSA 374:22-g

Union and NHTA argue that the Commission erred by failing to conduct adjudicative hearings needed to make "findings specific" to each public good criterion listed in RSA 374:22-g. NHTA Br. at 6-10. By its terms, however, RSA 374:22-g does not require a hearing in granting telephone authorizations to one of multiple applicants for a particular service area, nor does it require written findings. See RSA 374:22-g. It requires only that the Commission "consider" several factors before opening the territory to multiple competitive providers and additionally authorizes the Commission to approve CLEC entry "on its own motion."[13] In the presence of an express grant of authority to act without petition and the absence of express text regarding hearings and written findings, coupled with the understanding that express provisions of such requirements are in other statutory contexts, RSA 374:22-g indicates a legislative intent to leave the need for an adjudicative hearing and written findings to the Commission's sound discretion. See RSA 374:22-g, II; compare RSA 374:22-e (mandating "due notice to all interested parties and hearing" in Commission proceedings to determine service boundary disputes); see St. Joseph Hosp. of Nashua v. Rizzo, St. Joseph Hosp. of Nashua v. Savard, 141 N.H. 9, 11-12 (applying expressio unius est exclusio alterius that "the expression of one thing in a statute implies the exclusion of another") (internal citations omitted). Moreover,

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[13] In pertinent part, RSA 374:22-g reads as follows:

> I. To the extent consistent with federal law and notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service, subject to the jurisdiction of the commission, shall be nonexclusive. The commission, upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good unless prohibited by federal law.

the Commission did consider the RSA 374:22-g criteria in applying the Puc Rule 431 entry process to Union following the 2008 amendment. E.g., A. 50 (MetroCast Order).

The Union and NHTA rejoinders are not persuasive. It is not "ministerial" (NHTA Br. at 8-9) for the legislature to use RSA 374:22-g, as amended by the 2008 Act, to eliminate rural entry barriers and then direct the Commission to continue to consider various factors in deciding whether to grant entry into any ILEC territory. Moreover, the argument that no necessary conflict arises between RSA 374:22-g and the general franchising statute at RSA 374:26, such that the former should not supersede or displace the latter for telecommunications entry requests (see Union Br. at 10; NHTA Br. at 11-12), ignores that RSA 374:22-g establishes a newer and differently-worded "authorization" scheme for multiple telecommunications providers in a particular area that is distinct from the general "permission" scheme with a hearing requirement for individual public utilities as provided in the RSA 374:26.[14] Finally, the Union and NHTA arguments ignore the legislature's evident intentions in enacting the 2008 Act to enable competition in rural areas through the elimination of RSA 374:22-f and adding new text to RSA 374:22-g ensuring consistency with federal law and adding new text making RSA 374:22-g provisions govern notwithstanding contrary state law. The legislature would not have intended that rural ILECs could frustrate these pro-competitive provisions by creating new procedural

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[14] In pertinent part, RSA 374:26 provides as follows:

> Permission. The commission shall grant such permission whenever it shall, after due hearing, find that engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.

See also RSA 374:22, I (providing that a person or business cannot operate as a public utility "without first having obtained permission and approval of the commission").

barriers through mandatory adjudications under decades-old general utility statutes that have not otherwise been interpreted to require such a proceeding.

2. RSA 374:26

Union and NHTA also claim that the Orders on Rehearing violate RSA 374:26, the general franchising statute for all New Hampshire public utilities that permits authorizations "after due hearing." Union Br. at 15-19; NHTA Br. 5-14. The Commission found instead that RSA 374:22-g, enacted in 1995 and recently amended in 2008, "deals specifically with telecommunications services" whereas RSA 374:26, enacted in 1911 and last amended almost 50 years ago, "deals generally with all types of utility franchises." A. 47-48 (MetroCast Order); accord A. 56-57 (IDT Order). The Commission concluded that "RSA 374:22-g is the more specific statute and should control in cases regarding telephone franchises." A. 49-50 (MetroCast Order); A. 57 (IDT Order) (citing Bel Air Assocs., 154 N.H. at 233). MetroCast agrees that RSA 374:22-g displaces the RSA 374:26 permission standards and hearing requirement and that the Union and NHTA arguments should be rejected. This is a reasonable construction of these statutes that the Commission is charged with enforcing. See Appeal of Pinetree Power, Inc. & a., 152 N.H. at 96 (establishing that substantial deference should be given to the statutory interpretation of those charged with the administration of the statute).

Sections 374:22-g and 374:26 both grant certification authority to the Commission but employ different text, including the absence of a hearing requirement and the Commission's ability to authorize multiple providers in a particular service territory on its own motion in RSA 374:22-g. Compare footnotes 13 and 14 supra (establishing text of RSA 374:22-g and RSA 374:26, respectively). If the legislature had intended for both RSA 374:22-g and RSA 374:26 to apply in overlapping fashion to telecommunications applications, it would have stated so

expressly in the text. Moreover, Union and NHTA both ignore that if the hearing requirement in RSA 374:26 is truly required for all RSA 374:22-g telecommunications certification requests, the RSA 374:26 hearing requirement would apply in the FairPoint territories as well and eviscerate the non-adjudicative certification regime embedded in the Commission's Rules since 2005. See Puc Rule 431. Union's vision of a multi-factor adjudicative litigation, supported by detailed Commission findings on every factual and legal contention, conflicts with both the non-adjudicative regime that has been in place relative to CLEC applications in non-rural areas and with the legislature's decision expressly to eliminate the special protections for rural ILECs in the former RSA 374:22-f.

3. RSA 541-A:31

Union and NHTA also cite to RSA 541-A:31 which requires an adjudicative proceeding for a "contested case." Union Br. 19-20; NHTA Br. 16. They fail, however, to demonstrate that there is a contested case triggering application of this statute. Union and NHTA never requested nor were granted status as "parties," cannot provide authority that they have any "legal rights, duties or privileges" affected by this matter under amended RSA 374:22-g, nor can they establish that notice and a hearing were "required by law." Furthermore, the Commission has not treated telephone entry applications as contested cases since the 2005 enactment of the Puc 400 Rules, and reasonably, following that precedent, determined not to do the same here.

4. RSA 374:22-e

Union (but not NHTA) also argues that a CLEC request for certification should be classified as a situation where two or more utilities "find that they provide the same service in the same area" or constitute an application to "define, alter or establish service territories" under RSA 374:22-e. Union Br. at 19-20. As such, Union argues that such proceeding triggers full notice and public hearing requirements. However, as discussed in the IDT Order (A. 58), RSA

374:22-e predated the development of competition and enactment of the telecommunications competition provisions in RSA 374:22-g and is inapplicable.[15] This conclusion is reinforced by the fact that the repealed rural entry statute, RSA 374:22-f, required proof of compliance with RSA 374:22-e as a precondition for entry into rural areas but this condition was not incorporated into RSA 374:22-g, as amended by the 2008 Act to apply to rural as well as non-rural ILECs. To MetroCast's knowledge, CLEC applications in non-rural areas under former RSA 374:22-g have never been subject to Section 374:22-e and the failure to incorporate its provisions into the 2008 Act makes clear that the legislature did not retain it as to entry into rural areas.

5. RSA 363:17-b

NHTA (but not Union) contends that the failure to make specific findings on each RSA 374:22-g criterion constitutes a violation of RSA 363:17-b, the statute governing the content of Commission final orders on matters presented to it. NHTA Br. at 13-14. This argument also fails for the reason that RSA 374:22-g requires only that the Commission "consider" these factors but does not specify adjudication or written findings on each criterion.

Moreover, the Orders on Rehearing plainly meet all requirements for Commission orders as listed in the statute (i.e., identity of parties, positions of each party on each issue, a decision on each issue including the reasoning and whether the Commissioners concurred or dissented). See A. 58 (IDT Order). NHTA cannot bootstrap its claim of right to specific findings on all individual factors discussed in RSA 374:22-g (as discussed above) into a violation of RSA 363:17-b for failing to address each of those factors separately in the Orders on Rehearing.[16]

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[15] RSA 374:22-e also applies when "existing maps create overlapping service territories," reinforcing that the statute applies to inadvertent or unintentional territory conflicts among traditional monopoly utilities and not to multiple CLEC entry applications into a nonexclusive service territory.

[16] Union also claims as error the Commission's citation to a federal report setting forth the total amount of universal service funding received by Union in 2007. Union Br. at 22-23; see A. 57 (IDT Order discussion). This is not a matter of Commission judgment or fact finding, merely a reference to a federal report that specifies Union's

6. RSA 541-A:39

Union (but not NHTA) argues that the Commission failed to provide for mandatory notice to municipalities of the MetroCast application pursuant to RSA 541-A:39. Union Br. at 22. This argument was persuasively rejected by the Commission. See A. 49 (MetroCast Order). The Commission found that the statute applied to actions that directly affect a municipality and here "MetroCast already provides cable service and operates cable plant in the municipalities where it proposes to provide telephone services. We do not find the provision of telephone service over existing cable plant to cause any direct effect on these municipalities." Id. Furthermore, Union lacks legal standing to raise claims on behalf of municipalities. See Roberts v. Gen. Motors Corporation, 138 N.H. 532, 536 (1994) (determining that even an injured party lacks standing to make a claim if not protected by a statutory scheme) (subsequent history on other issues omitted).[17]

7. Puc Rules

Both Union and NHTA claim error in the Commission's decision to accept the MetroCast and IDT certification filings using the Puc Rule 431 application form and grant certifications using the non-adjudicative process established in such rule. Union Br. at 27-29; NHTA Br. at 17-19. Union instead claims that Puc Rules at 203.05 and 203.06 should have been applied. Union Br. at 27. None of these arguments is persuasive.

First, Union and NHTA argue that since Puc Rule 431.01 by its terms only applies to applications in territories served by non-exempt telephone incumbents (i.e., FairPoint), the

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receipt of federal funds. To the extent that the Commission should have followed administrative notice procedures before referencing the report in the Orders on Rehearing, the error is harmless.

[17] Union also "raises the question," without express argument, that IDT does not qualify as a "utility" under RSA 362:2. Union Br. at 24. This does not constitute appellate argument sufficient to merit a separate argument on brief. Moreover, the Commission rejected Union's claim that IDT was not a utility in its recent IDT-Union Arbitration Order. IDT America Corp. Petition for Arbitration of an Interconnection Agreement with Union Telephone Company, Docket No. DT 09-048, October 7, 2009, Final Order, at 11-12.

Commission is barred from reviewing MetroCast's application using the streamlined Puc Rule 431.01 process following the statutory change. Union Br. at 27-29; NHTA Br. at 17-19. Union and NHTA cite no authority for this proposition and this argument lacks any support under the 2008 Act or in the text of Puc Rule 431.01. To the contrary, the Commission is authorized to respond to a statutory change on a case-by-case basis pending revisions to the applicable regulations. See Stuart v. The State of New Hampshire, Div. for Children and Youth Servs., 134 N.H. 702, 705 (determining that the promulgation of rules is not necessary to carrying out a statute). NHTA argues that Stuart is not comparable to the approval of MetroCast's application in that Stuart addresses "an agency's authority to enforce a statute in the absence of a rule." NHTA Brief at 19 n. 6 (emphasis added). NHTA fails to acknowledge that no Commission rule specifies an application process for entry into rural areas and that the former RSA 374:22-f was the extent of statutory authority for such approval. Absent RSA 374:22-f and any rule that specifies approval for entry into rural territories, the Commission's decision to respond to the statutory change on a case-by-case basis is proper under Stuart.

Second, while Puc Rule 431 prescribes a non-adjudicative process for CLEC entry applications for a non-exempt ILEC (i.e., FairPoint), it does not preclude use of such process, nor specify alternative procedures, for the territories of exempt (i.e., rural) incumbents under the newly enacted statute. Puc Rule 431.01(d) certainly mandates the Commission, under express circumstances, to authorize a CLEC applicant "to provide competitive local exchange service in the territory of non-exempt ILECs," (i.e., FairPoint), but nothing in Puc Rule 431.01, or any other Rule, prohibits the Commission from applying the Puc Rule 431 streamlined process to territories of the formerly exempt ILECs in its consideration of CLEC entry applications when

there is no longer any statutory authority to suggest an alternative procedure. See 2008 Act (repealing RSA 374:22-f).

Third, both Union and NHTA point to the uncertain state of the Commission's pending rulemaking to amend Puc Rule 431 to reflect the 2008 Act. Union Br. at 20-29; NHTA at 18-19. The Commission's decision to suspend the rulemaking process during the pendency of Union's appeal of the MetroCast Ruling (and, later, its appeal of the IDT Ruling), presumably to await the Court's interpretation, is reasonable and does not concede error as Union and NHTA imply.

Finally, Union's argument that Puc Rules 203.05 and 203.06 are applicable is unfounded. The Commission created a streamlined application process for CLEC entry into FairPoint territories under the former RSA 374:22-g, now applicable to rural ILEC territories as well, and has authority to apply such process "on its own motion" while rules are being developed to implement the amended statute. This application process eliminates the need to file adjudicative pleadings such as petitions and motions, which are the subjects of Puc Rules 203.05 and 203.06. Union's efforts to apply these adjudicative rules to a non-adjudicative procedure are unpersuasive.

8. Constitutional Provisions

Finally, Union and NHTA claim that the lack of notice, evidentiary hearings and fact finding constitutes a due process violation under New Hampshire and United States Constitutions.[18] Union Br. at 20-22; NHTA Br. at 13-14. Union improperly seeks to apply the constitutional right of notice and a hearing to a process that does not involve the taking of any

[18] In support of this claim Union cites to Appeal of Public Service Company of New Hampshire, 122 N.H. 1062 (1982). The subject of Appeal of Public Service Company of New Hampshire is the Commission's authority to prevent an electric company from issuing securities to fund the completion of an electrical plant. Id. at 1065. In the outset of its decision, the Court determines that the company has a vested property right to complete construction of the facility. Id. at 1069. As Union has been unable to identify any comparable right, the due process analysis in Appeal of Public Service Company of New Hampshire is not applicable to Union in MetroCast's certification proceeding.

property rights held by Union. See Pennichuck Corporation & a.v. City of Nashua, 152 N.H. 729, 734 (2005) (distinguishing Appeal of Public Service Company of New Hampshire, supra, and determined that a utility that remains able to operate, even while subject to condemnation proceedings, has not been deprived of the economically viable use of its property).

Furthermore, "it is long settled that 'property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules -- or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" Appeal of the Office of the Consumer Advocate, 148 N.H. at 137-40 (internal citations omitted); see Appeal of Town of Bethlehem, 154 N.H. 314, 329 (2006) ("[t]he hallmark of a legally protected property interest is an individual entitlement grounded in State law") (internal citations omitted). As discussed above, the statutory scheme applicable to telephone certifications, absent a mandatory state law hearing requirement, fails to create a constitutional property interest in Union relative to MetroCast's entry application.[19] Moreover, the repeal of RSA 374:22-f specifically revoked any applicable statutory rights that may have been held by Union.

II. Union Lacks Legal Standing to Contest the Commission's Certifications.

The Commission's conclusion that RSA 374:22-g governs the instant dispute and does not require an adjudicative proceeding is reasonable and requires affirmance of the MetroCast and IDT Orders and dismissal of the Union appeal. Even if RSA 374:26 were determined to apply to the instant certification process, dismissal of the Union appeal would still be required because Union lacks sufficient legal standing to make a claim, both generally and under the language of that statute.

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[19] Union's claim of a property interest with respect to its existing business conflicts with, and is further undercut by, the New Hampshire Constitution's strong support for free and fair competition. See N.H. Constitution, Part II, Art. 83 (encouraging regulation of business activities that restrain free trade).

When an administrative agency has denied a motion for rehearing pursuant to RSA 541:3, an applicant must show that it has or will suffer a direct injury from the agency's decision to show standing in requesting an appeal. See Appeal of Robert C. Richards, Edward Kaufman and Martin Rochman; Appeal of Campaign for Ratepayers Rights and John V. Hilberg (New Hampshire Public Utilities Commission), 134 N.H. 148, 154 (1991). Union claims that it is "directly affected" by MetroCast's certification due to increased competition in its service area and its obligation to serve as the carrier of last resort. Union Br. at 8 – 9. The potential for increased competition in the Union territory, even if true, is insufficient to establish injury. See Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hosp., 139 N.H. 450, 452 (1995). Section 374:22-g provides for entrance by multiple providers in the territory of rural ILECs, thereby making clear that increased competition from providers by itself is not sufficient to confer standing. Similarly, Union has failed to show how MetroCast's certification has or will directly injure Union as a carrier of last resort. Union is a carrier of last resort by virtue of its local services monopoly and it retains the right to request alternative regulation treatment or a waiver relative to certain regulatory requirements following competitive entry.

In addition, Union lacks standing under the plain language of the statute that Union asserts is applicable. Section 374:26 empowers the Commission to authorize the provisioning of telecommunications services without holding a hearing when all "interested parties are in agreement." (Emphasis added.) Under Puc Rule 102.10 a "party" is "each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party." See A-MetroCast Br. 7 (text of Puc Rule 102.10). Union does not qualify as a party under these standards. First, Union was not a named or admitted party to the MetroCast certification proceedings. See Appeal of Town of Bethlehem, 154 N.H. at 326 (relying on record

of proceedings before the Department of Environmental Services ("DES") and holding that because the Appellant had not been admitted as a party, it should not be treated as such).

Second, even if Union had sought party status, which it did not, Union has not established legal interest sufficient to confer an entitlement as a right to be admitted as a party in the proceedings. See id. (upholding DES decision not to rule on appellant's motion to intervene in an application proceeding because DES did not consider it to be adjudicative and the statutory scheme omitted any provision granting appellant party status despite statutory notice rights). While there is no New Hampshire law on point, case law in other jurisdictions supports the lack of competitor standing with respect to terms and conditions for certifying new entrants. See, e.g., Cablevision Systems Corporation v. Department of Telecommunications and Energy et al., 428 Mass. 436, 438-49 (1998) (denying standing to cable company that had sought to participate in electric utility holding company case that would affect regulatory treatment of the electric company's cable and telecommunications affiliate under "public interest" standard); New England Cable Television Ass'n, Inc. v. Department of Public Utility Control, 247 Conn. 95, 717 A.2d 1276 (1998) (denying standing to cable company association with respect to issues other than those pertaining to enforcement of State cable company level playing field statute).

Finally, RSA 374:22-g authorizes the Commission to approve the provisioning of telecommunications services by multiple providers in a service area and further specifies what the Commission must consider when making this determination. Neither this statute nor any other statute or rule requires the Commission to make an ILEC a party to any proceedings in which it reviews an application for the provisioning of telecommunications services in all or part of the ILEC's service territory. Therefore, Union was not entitled as of right to be a party to the proceedings.

Union has had ample opportunity to make its arguments to the Commission that a full adjudicative proceeding is warranted, in both the MetroCast and IDT certification proceedings and in the predecessor DT 08-013 Comcast-TDS entry docket under prior law. See supra at p. 9 n. 12 (discussing other proceedings). Union should not be granted another opportunity to turn administrative and court litigation into a strategy to thwart the development of legitimate competition in its rural service territory.

CONCLUSION

For the reasons discussed above, the Court should dismiss Union's Petition for Appeal and affirm the Commission's certifications to MetroCast and IDT to provide competitive telecommunications services in Union's territory.

REQUEST FOR ORAL ARGUMENT

MetroCast does not believe that oral argument is required. To the extent oral argument is scheduled, MetroCast requests argument of not less than 15 minutes before the full Court.

Respectfully submitted,

METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

Date: November 17, 2009

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ADDENDUM

410900

*2008 NH ALS 350, *; 2008 NH Ch. 350;*
2007 NH SB 386

NEW HAMPSHIRE ADVANCE LEGISLATIVE SERVICE

STATENET

NEW HAMPSHIRE SECOND YEAR OF THE 160TH SESSION OF THE GENERAL COURT

CHAPTER 350

SENATE BILL 386

2008 NH ALS 350; 2008 NH Ch. 350; 2007 NH SB 386

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT STATE OF NEW HAMPSHIRE In the Year of Our Lord Two Thousand Eight AN ACT relative to service territories served by several telephone utilities.

NOTICE:
[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED **<A]**
[D> Text within these symbols is deleted **<D]**

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

Be it Enacted by the Senate and House of Representatives in General Court convened:

[*1] 350:1 Service Territories Served by Certain Telephone Utilities. Amend RSA 374:22-g to read as follows:

374:22-g Service Territories Served by Certain Telephone Utilities **[D>** With More Than 25,000 Access Lines **<D]** .

I. **[A>** TO THE EXTENT CONSISTENT WITH FEDERAL LAW AND **<A]** notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service **[D>** and that has more than 25,000 access lines **<D]**, subject to the jurisdiction of the commission, shall be nonexclusive. The commission, upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good **[A>** UNLESS PROHIBITED BY FEDERAL LAW **<A]** .

II. In determining the public good, the commission shall 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.

III. The commission shall adopt rules, pursuant to RSA 541-A, relative to the enforcement of this section **[D>** and RSA 374:22-f **<D]** .

[*2] 350:2 Repeal. RSA 374:22-f, relative to service territories served by several telephone utilities with fewer than 25,000 access lines, is repealed.

[*3] 350:3 Effective Date. This act shall take effect 60 days after its passage.

Effective Date: September 5, 2008

HISTORY:
Approved by the Governor on July 7, 2008.

SPONSOR:
Gottesman

LEXSEE 1995 NH ALS 147

NEW HAMPSHIRE ADVANCE LEGISLATIVE SERVICE
STATENET

NEW HAMPSHIRE 1995 REGULAR SESSION

CHAPTER 147

SENATE BILL 106

1995 NH ALS 147; 1995 NH LAWS 147; 1995 NH Ch. 147; 1995 NH SB 106

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT relative to competition among telecommunications providers.

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

Be it Enacted by the Senate and House of Representatives in General Court convened:

[*1] 147:1 Findings and Purpose. The general court recognizes that in order for the state to maintain its position as a business and commercial center and to attract new business and industry, the state's telecommunications infrastructure must contain state-of-the-art technology and that its consumers must have access to new, innovative, and sophisticated telecommunications services. The general court further recognizes that competition is emerging in the telecommunications market sectors. Such competition can be fostered through statutory and regulatory changes by federal and state governments. Competitive markets generally encourage greater efficiency, lower prices, and more consumer choice. It is the policy of the state of New Hampshire to encourage competition for all telecommunications services, including local exchange services, which will promote lower prices, better service, and broader consumer choice for the residents of New Hampshire.

[*2] 147:2 Service Territories. RSA 374:22-f is repealed and reenacted to read as follows:

374:22-f Service Territories Served by Certain Telephone Utilities With Fewer Than 25,000 Access Lines. A telephone utility shall not construct or extend its facilities in order to furnish, or otherwise furnish or offer to furnish, its service to premises within the service territory of another telephone utility that provides local exchange service and that has fewer than 25,000 access lines, except when requested by the utility in the territory of which the premises are located and when the commission, upon petition, finds and determines that the service proposed to be rendered will be consistent with the criteria set forth in RSA 374:22-e and RSA 374:22-g.

[*3] 147:3 New Section; Service Territories Served by Certain Telephone Utilities With More Than 25,000 Access Lines. Amend RSA 374 by inserting after section 22-f the following new section:

374:22-g Service Territories Served by Certain Telephone Utilities With More Than 25,000 Access Lines.

I. Notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service and that has more than 25,000 access lines, subject to the jurisdiction of the commission, shall be nonexclusive. The commission, upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommuni-

cations services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good.

II. In determining the public good, the commission shall 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.

III. The commission shall adopt rules, pursuant to RSA 541-A, relative to the enforcement of this section and RSA 374:22-f.

[*4] 147:4 Application.

I. The commission shall take steps to ensure that all new and incumbent providers of telecommunications services cooperate fully to accomplish the purposes of this act.

II. The commission shall adopt rules, pursuant to RSA 541-A, necessary to enforce the provisions of this act, no later than December 31, 1996.

[*5] 147:5 Effective Date. This act shall take effect 60 days after its passage.

HISTORY:
Approved: May 24, 1995

Effective: July 23, 1995

SPONSOR: Rodeschin

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 374
GENERAL REGULATIONS

Telephone Utilities Service Territories

Section 374:22-g

374:22-g Service Territories Served by Certain Telephone Utilities. –

I. To the extent consistent with federal law and notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service, subject to the jurisdiction of the commission, shall be nonexclusive. The commission, upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good unless prohibited by federal law.

II. In determining the public good, the commission shall 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.

III. The commission shall adopt rules, pursuant to RSA 541-A, relative to the enforcement of this section.

Source. 1995, 147:3, eff. July 23, 1995. 2008, 350:1, eff. Sept. 5, 2008.

LexisNexis

LEXSTAT RSA 374:26'

*** STATUTES CURRENT THROUGH CHAPTER 327 OF THE 2009 SESSION ***
*** ANNOTATIONS CURRENT THROUGH CASES DECIDED AUGUST 15, 2009 ***

TITLE XXXIV Public Utilities
CHAPTER 374 General Regulations
Granting of Permission for Extensions, New Business, etc.

Go to the New Hampshire Code Archive Directory

RSA 374:26 (2009)

374:26 Permission.

The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.

1 of 1 DOCUMENT

PUBLIC UTILITIES COMMISSION
CHAPTER Puc 400. RULES FOR TELECOMMUNICATIONS
PART Puc 431 CLEC REGULATORY REQUIREMENTS

N.H. Admin. Rules, Puc 431.01 (2009)

PUC 431.01 REGISTRATION.

(a) No person or entity shall install or offer local exchange service in New Hampshire unless and until that person or entity is registered as a CLEC.

(b) Before commencing operations as a CLEC in New Hampshire the entity proposing to provide CLEC service shall register with the commission and receive its CLEC Authorization Number.

(c) To register with the commission a CLEC shall file:

(1) A completed Form CLEC-10 Application for Registration, described in Puc 449.07, which including the following attachments:

a. A completed Form CLEC-1 Contact Information;

b. Evidence of a surety bond pursuant to Puc 431.04 if applicable;

c. A completed Form CLEC-11 Intent to Use Uniform Tariff, if the CLEC wishes to use the uniform tariff pursuant to Puc 431.05; and

d. A rate schedule pursuant to Puc 431.06.

(d) Unless the commission denies an application for CLEC registration pursuant to Puc 431.02, it shall issue a CLEC authorization number which authorizes the applicant to provide competitive local exchange service in the territory of non-exempt ILECs.

(e) A CLEC authorized prior to the effective date of these rules shall use the commission's order number granting it authority to operate as a CLEC as its authorization number.

(f) Any authorization number obtained by a CLEC under this part shall be non-transferable.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 08-130

METROCAST CABLEVISION OF NEW HAMPSHIRE

Application for Certification as a Competitive Local Exchange Carrier

Order Denying Motion to Rescind Authority and Motion for Rehearing

ORDER NO. 24,939

February 6, 2009

I. PROCEDURAL HISTORY

On September 19, 2008, MetroCast Cablevision of New Hampshire, LLC (MetroCast) filed an application to amend its certification as a competitive local exchange carrier (CLEC) in New Hampshire to include, in addition to its existing service in the FairPoint[1] service territory, the service territory of Union Telephone Company (Union). Union is a small incumbent local exchange carrier (ILEC) operating in the towns of Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham, and Strafford. On September 30, 2008, pursuant to RSA 374:22-g and N.H. Code of Admin. Rules Puc 431.01, MetroCast was granted authority to operate as a CLEC in the Union service territory.

On October 10, 2008, Union filed a motion to rescind MetroCast's authority to operate in Union's service territory. MetroCast filed an opposition to Union's motion on October 17, 2008. On October 21, 2008, a group of rural members of the New Hampshire Telephone Association (Rural ILECs) filed a letter in support of Union's motions. On October 27, 2008, Comcast

[1] Northern New England Telephone Operations LLC, d/b/a FairPoint Communications – NNE (FairPoint) serves more than 90 percent of the telephone customers in New Hampshire as a result of its acquisition of the Verizon landline business in New Hampshire.

Phone of New Hampshire, LLC, filed a letter disputing Union's interpretation of certain New Hampshire statutes and Commission rules.

II. POSITIONS OF THE PARTIES

A. Union

Union requests that the Commission rescind MetroCast's CLEC authorization in the Union service territory. Union argues that the Commission did not follow an appropriate procedure in granting MetroCast's request to expand its CLEC service territory. According to Union, the Commission is required by RSA 374:26, 374:22-g, 347:22-e, 541-A:31 and 541-A:35, as well as Commission rules, to provide notice to interested parties and an opportunity for hearing. Union claims that following a hearing the Commission must issue an order containing findings as required by RSA 363:17-b. Union asserts it did not receive notice of the Commission's approval of MetroCast's application and that the Commission failed to hold a hearing, make any findings, or issue an order regarding the application.

Union further claims that it was a mistake of law and fact for the Commission to utilize Puc 431.01 and the Puc Part 431 process to authorize MetroCast to operate in the Union service territory. Union maintains that Puc 431.01 only authorizes CLECs to operate in the service territories of non-exempt ILECs. Union asserts that it is an exempt ILEC pursuant to 47 U.S.C. §§ 153 (37) and 251 (f).

Union also argues that the Commission treated Comcast's application to do business in another small ILEC service territory differently than MetroCast's application to do business in Union's service territory. The Commission granted a hearing pursuant to RSA 374:26 in the Comcast case. *See*, Order No. 24,887, *Comcast Phone of New Hampshire, LLC* (August 18, 2008). According to Union, the grant of CLEC authority to MetroCast in Union's service

territory may have an impact on Union's ability to earn a reasonable return and to fulfill universal service and carrier of last resort obligations.

Union asserts that the Commission failed to notify the towns in Union's service territory of MetroCast's CLEC registration contrary to the requirements of RSA 541-A:39, I. Finally, Union requests a rehearing of the Commission's decision to grant MetroCast CLEC authority in the Union service territory.

B. MetroCast

MetroCast argues that Union lacks standing to oppose the MetroCast CLEC application because the amended RSA 374:22-g opens the Union service territory to competition and does not require an adjudicatory proceeding for competitive entry. MetroCast maintains that the repeal of 374:22-f removes Union's ability to claim an exclusive service territory and leaves Union with no right to oppose CLEC entry into its service territory.

MetroCast distinguishes this case from Comcast's CLEC registration in the TDS Companies' services territories on the grounds that the Comcast order, Order No. 24,887 (August 18, 2008), was issued before the amendment of 374:22-g took effect on September 5, 2008. MetroCast also argues that the Comcast case is different because Comcast takes the position that its VoIP (Voice over Internet Protocol) service is not a telecommunications service and is not regulated. MetroCast points out that it had already agreed to submit to regulation of its digital voice service.

MetroCast challenges Union's claims that the CLEC registration process must be conducted as an adjudicatory proceeding by pointing out that the Commission has been issuing CLEC registrations for several years without adjudicative proceedings. MetroCast argues that such an adjudicative process would impose significant burdens of time and cost to CLEC entry

in New Hampshire and would constitute an anti-competitive barrier to entry. Furthermore, according to MetroCast, Union may not use the reference to non-exempt service territories in N.H. Code of Admin. Rules Puc 431.01(d) as a bar to MetroCast's entry because the amendment to 374:22-g preempts that rule.

Finally, MetroCast takes the position that RSA 541-A:39 does not require the Commission to notify the municipalities of the MetroCast CLEC registration. Since MetroCast will be offering its telephone service over pre-existing facilities, MetroCast takes the position that the grant of certification has no direct effect on municipalities.

C. Rural ILECs

Granite State Telephone, Inc., Merrimack County Telephone Company, Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc., Dunbarton Telephone Company, Inc. Bretton Woods Telephone Company, Inc., Northland Telephone Company of Maine, Inc. and Dixville Telephone Company, all rural carriers and members of New Hampshire Telephone Association (Rural ILECs), support Union's motions. The Rural ILECs argue that RSA 374:22-g must be read in conjunction with RSA 374:22 and RSA 374:26. The Rural ILECs maintain that RSA 374:26 requires a hearing if interested parties are not in agreement, and therefore they assert that the Commission must conduct a hearing in this case.

The Rural ILECs claim that the Commission may not rely upon the procedure set out in Puc 431.01 and 431.02 because the language "non-exempt ILECs" prevents the Commission from allowing entry into small carriers' service territories. The Rural ILECs take the position that the Commission must undertake a new rulemaking process to determine the procedure for allowing CLECs to enter small carrier's service territories.

D. Comcast

Comcast argues that Union's interpretation of 374:22-g would erect barriers to entry for all competitive telecommunications carriers in the form of lengthy hearings involving difficult-to-prove evidentiary findings in the control of ILECs. Further according to Comcast, Union's position attempts to alter the entry procedures the Commission has applied routinely under Puc 431.01-431.02 and undermines the policy of the State of New Hampshire to encourage competition for telecommunications services.[2] Comcast points out that the amendment of RSA 374:22-g and the repeal of RSA 374:22-f makes it clear that there is to be competition for telephone service in all areas of the state. Comcast disagrees with the Rural ILECs' assertion that the Commission should open a new rulemaking process to deal with CLEC entry into small ILEC service territories. Instead, Comcast asserts that 374:22-g requires that the same process apply to both large and small ILECs.

Comcast argues that statutory rules of construction provide that the more recent, more specific statute, RSA 374:22-g, controls over prior general ones such as RSA 374:26. Further, Comcast states that if the legislature had intended to require a hearing for CLEC entry into small ILEC territories it could have provided a reference to RSA 374:26, or for a hearing, in RSA 374:22-g. Finally, Comcast maintains that reliance on the non-exempt language in Puc 431.01(d) is misplaced in light of the amendments to RSA 374:22-g.

III. COMMISSION ANALYSIS

This case calls into question the Commission's authority to act pursuant to RSA 374:22-g and Commission rules, Puc 431.01-431.02, to allow an existing cable provider to begin providing competitive telephone services within a small ILEC's service territory.

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[2] 1995 N.H. Laws 147:1.

A. State and Federal Statutory Analysis

We begin by observing that the telecommunications landscape for small ILECs in New Hampshire is governed by the same federal statute that governs the largest ILEC. Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the essential distinction between small and large ILECs is that small ILECs[3] are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union and the Rural ILECs are not currently required to unbundle their networks to CLECs in New Hampshire.

At the state level, due to recent legislative changes, large and small ILECs are treated the same for purposes of competitive entry into their service territories. Both are now governed by RSA 374:22-g, which provides that all telephone service territories will be nonexclusive. RSA 374:22-g further allows the Commission to authorize multiple telecommunications carriers in any telephone service territory "*to the extent consistent with federal law and notwithstanding any other provision of law to the contrary.*" RSA 374:22-g, I (emphasis added).

We read RSA 374:22-g to grant us the discretion to permit competitive local exchange carriers to do business within the service territory of Union Telephone. We further conclude that RSA 374:22-g does not require a hearing in order to grant a CLEC application and, correspondingly, the necessary requirements of due process are satisfied by the procedures set forth in our rules. *See*, Puc Part 431. RSA 374:22-g instructs us to implement the section consistent with federal law and notwithstanding inconsistent state laws. RSA 374:22-g, enacted

[3] 47 U.S.C. § 153 (37) defines rural telephone as below 50,000 access lines or operating in areas with less concentrated populations.

in 1995 and amended in 2008, deals specifically with telecommunications services. RSA 374:26, enacted in 1911 and amended in 1961, deals more generally with all types of utilities franchises. As a result, RSA 374:22-g is the more recent and more specific statute and should control in cases regarding telephone franchises. *See, Bel Air Associates v. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006).

State and national policies encourage competition in local telecommunications service. Policy makers have chosen to encourage that policy because they believe it leads to economic efficiency. The only thing that distinguishes this CLEC application from the numerous others we have approved through our streamlined registration process under Puc Part 431 is that in this case the ILEC whose service territory is being entered is subject to the rural exemption under the federal statute. *See*, 47 U.S.C. § 251 (f). We find no indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry. In fact, 47 U.S.C. § 251 (a) and (b) make clear that all local exchange carriers, regardless of size, must interconnect with other carriers operating in their service territory. The recent amendments to RSA 374:22-f and RSA 374:22-g make New Hampshire law consistent with federal law on this point. RSA 374:22-g treats all New Hampshire ILECs, whether large or small, equally concerning competitive entry. Finally, the 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition. 47 U.S.C. § 253. In an effort to support the important policy goal of promoting competitive telecommunications markets and to comply with federal statutes, the Commission's CLEC registration rules provide for an administratively efficient process for competitors to enter the local telecommunications market. *See*, Puc 431.01.

Union has claimed that it is entitled to the same process provided in the Comcast CLEC application to provide service in several TDS Company service territories.[4] Comcast made its CLEC application before RSA 374:22-g was amended. As a result, the Commission could not consider the application under RSA 374:22-g because the TDS Companies each had less than 25,000 access lines. The Commission considered the Comcast CLEC application pursuant to RSA 374:22 and RSA 374:26, the more general utility franchise provisions. Because RSA 374:26 provided for hearing and the TDS Companies opposed Comcast's entry into their service territories, the Commission set the matter for hearing. As discussed above, the MetroCast application was made within a different statutory context and a different process therefore applies.

Finally, we reject Union's claims that RSA 541-A:39 requires us to give notice to the municipalities in which MetroCast seeks CLEC authorization. RSA 541-A:39 is triggered by actions which directly affect the municipality. In this case MetroCast already provides cable service and operates cable plant in the municipalities where it proposes to provide telephone services. We do not find the provision of telephone service over existing cable plant to cause any direct effect on these municipalities.

B. Commission Rules and Rulemaking Authority

RSA 374:22-g, III provides the Commission with specific authority to promulgate rules to enforce the section and the Commission must act within the authority delegated to it by the legislature. *See, Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 689 (2008). When the Commission exercised the authority delegated to it by RSA 374:22-g and updated the rules in 2005, it balanced competing interests, including competition, fairness, economic efficiency,

[4] *See*, DT 08-013 *Comcast Phone of New Hampshire, Request for Authority to Provide Local Telecommunication Services*, Order No. 24,887 (Aug. 18, 2008). Order granting hearing.

universal service, carrier of last resort obligations, and an ILEC's ability to earn a reasonable return and recover costs incurred to serve CLECs. Puc Part 431 strikes an appropriate balance among these various interests regardless of whether the ILEC service territory is large or small.

Consistent with RSA 374:22-g, the current rules support competition, fairness and economic efficiency by allowing for an administratively efficient process to register a CLEC and by eliminating unnecessary barriers to CLEC entry into ILEC service territories In cases where the ILEC's costs exceed those of an efficient competitor, the development of a competitive market may cause the ILEC to either lose customers, or find ways to reduce costs,[5] but such a result is fully consistent with RSA 374:22-g. The carrier of last resort burden may be more expensive for small ILECs than for larger ILECs but under the current federal statutory scheme, ILECs operating in high cost service areas are compensated for this obligation through the universal service fund (USF). *See,* 47 U.S.C. § 254. In fact, the ILEC at issue in this case, Union, received a total of approximately $1.135 million in federal high cost support in 2007[6]. In addition, ILECs can negotiate the price and terms of traffic exchange, as required by 47 U.S.C. § 251 (b)(5), to recover the costs incurred to serve a CLEC. This provides an adequate vehicle for Union to recover expenses incurred to benefit competitive providers.

The fact that small ILECs had exclusive service territories under state law at the time the CLEC rules were last updated in 2005 does not mean those rules should not apply equally to large and small ILECs now that RSA 374:22-g has been amended. RSA 374:22-g makes no distinction between small and large ILECs. We find no sound policy reason to promulgate separate rules for small ILECs, nor has Union given any in its request to rescind our registration

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[5] In recognition of the pressures on small ILECs created by competitive markets the legislature has provided for small ILECs to request pricing flexibility and less regulation. *See*, RSA 374:3-b.

[6] FCC, Universal Service Monitoring Report, CC Docket No. 98-202, 2007, Table 3-30, at 3-134.

of MetroCast. The Puc Part 431 rules do not contain any express prohibition on registering CLECs in non-exempt ILEC service territories. The reference to non-exempt ILECs in Puc 431.01(d) does not prohibit registration of CLECs in non-exempt ILEC service territories. To interpret Puc 431.01(d) as such a prohibition would be inconsistent with federal law and contrary to our statutory directive in RSA 374:22-g, which operates "notwithstanding any other provision of law to the contrary" and thus prevails over any conflicting rule.

C. Conclusion

Consistent with the enabling legislation, RSA 374:22-g, as well as federal law, we have developed an administratively efficient process for CLEC registration to compete in ILEC service territories. MetroCast already operates in many areas of the state and has proven itself to be a competent and responsible CLEC. We find Union's arguments concerning the process of registering MetroCast in its service territory unpersuasive and we conclude that MetroCast's expansion of service into the Union service territory will be for the public good.

Based upon the foregoing, it is hereby

ORDERED, that Union's Motion to Rescind MetroCast's competitive local exchange carrier registration is **DENIED**; and it is

FURTHER ORDERED, that Union's Motion for Rehearing is **DENIED.**

By order of the Public Utilities Commission of New Hampshire this sixth day of February, 2009.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 09-065

IDT AMERICA CORP.

Application for Certification as a Competitive Local Exchange Carrier

Order Denying Motion to Rescind Authority and Motion for Rehearing

ORDER NO. 24,970

May 22, 2009

I. BACKGROUND

On February 27, 2009, IDT America Corp. (IDT) filed an application to amend its certification as a competitive local exchange carrier (CLEC) in New Hampshire to include, in addition to its existing service in the FairPoint[1] service territory, the service territory of Union Telephone Company (Union). IDT provides telecommunications services jointly with MetroCast, pursuant to a settlement agreement reached in Docket No. DT 06-169, approved by Order No. 24,727. Union is a small incumbent local exchange carrier (ILEC) operating in the towns of Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham, and Strafford.

On March 3, 2009, pursuant to RSA 374:22-g and N.H. Code of Admin. Rules Puc 431.01, IDT was granted authority to operate as a CLEC in the Union service territory, conditioned on full compliance with the terms of the settlement agreement reached in DT 06-169. On March 6, 2009, Union filed a motion to rescind IDT's authority to operate in Union's

[1] Northern New England Telephone Operations LLC, d/b/a FairPoint Communications – NNE (FairPoint) serves more than 90 percent of the telephone customers in New Hampshire as a result of its acquisition of the Verizon landline business in New Hampshire.

service territory, further moving for a rehearing if IDT's authority is not rescinded. No response has been filed by IDT.

Union requests that the Commission rescind IDT's CLEC authorization in the Union service territory. Union argues that the Commission did not follow an appropriate procedure in granting IDT's request to expand its CLEC service territory. According to Union, the Commission is required by RSA 374:26, 374:22-g, 347:22-e, 541-A:31 and 541-A:35, as well as Commission rules, to provide notice to interested parties and an opportunity for hearing. Union claims that following a hearing the Commission must issue an order containing findings as required by RSA 363:17-b. Union asserts it did not receive notice of the Commission's approval of IDT's application and that the Commission failed to hold a hearing, make any findings, or issue an order regarding the application.

Union further claims that it was a mistake of law and fact for the Commission to utilize Puc 431.01 and the Puc Part 431 process to authorize IDT to operate in the Union service territory. Union maintains that Puc 431.01 only authorizes CLECs to operate in the service territories of non-exempt ILECs, and that it is an exempt ILEC pursuant to 47 U.S.C. §§ 153 (37) and 251 (f).

Union asserts that the Commission failed to notify the towns in Union's service territory of IDT's CLEC registration contrary to the requirements of RSA 541-A:39, I. Union also asserts that the application by IDT to expand into the Union service territory does not meet the requirements of 449.07(d), which specifies that "the applicant shall list 3 primary telecommunications services the applicant will offer in New Hampshire." The IDT application listed one service, and Union therefore asserts that the Commission is in error in granting CLEC

authority to IDT in the Union service territory. Finally, Union requests a rehearing of the Commission's decision to grant IDT CLEC authority in the Union service territory.

II. COMMISSION ANALYSIS

Similar to the arguments raised by Union in Docket No. DT 08-130, with respect to Metrocast Cablevision of New Hampshire,[2] this case calls into question the Commission's authority to act pursuant to RSA 374:22-g and Commission rules, Puc 431.01-431.02, to allow an existing cable provider to begin providing competitive telephone services within a small ILEC's service territory.

A. State and Federal Statutory Analysis

We begin by observing that the telecommunications landscape for small ILECs in New Hampshire is governed by the same federal statute that governs the largest ILEC. Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the essential distinction between small and large ILECs is that small ILECs[3] are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union is not currently required to unbundle its network to CLECs in New Hampshire.

At the state level, due to recent legislative changes, large and small ILECs are treated the same for purposes of competitive entry into their service territories. Both are now governed by RSA 374:22-g, which provides that all telephone service territories will be nonexclusive. RSA 374:22-g further allows the Commission to authorize multiple telecommunications carriers in

[2] See Order No. 24,939 (February 6, 2009)
[3] 47 U.S.C. § 153 (37) defines rural telephone as below 50,000 access lines or operating in areas with less concentrated populations.

any telephone service territory "*to the extent consistent with federal law and notwithstanding any other provision of law to the contrary.*" RSA 374:22-g, I (emphasis added).

We read RSA 374:22-g to grant us the discretion to permit competitive local exchange carriers to do business within the service territory of Union Telephone. We further conclude that RSA 374:22-g does not require a hearing in order to grant a CLEC application and, correspondingly, the necessary requirements of due process are satisfied by the procedures set forth in our rules. *See*, Puc Part 431. RSA 374:22-g instructs us to implement the section consistent with federal law and notwithstanding inconsistent state laws. RSA 374:22-g, enacted in 1995 and amended in 2008, deals specifically with telecommunications services. RSA 374:26, enacted in 1911 and amended in 1961, deals more generally with all types of utilities franchises. As a result, RSA 374:22-g is the more recent and more specific statute and should control in cases regarding telephone franchises. *See, Bel Air Associates v. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006).

State and national policies encourage competition in local telecommunications service. Policy makers have chosen to encourage that policy because they believe it leads to economic efficiency. The only thing that distinguishes this CLEC application from the numerous others we have approved through our streamlined registration process under Puc Part 431 is that in this case the ILEC whose service territory is being entered is subject to the rural exemption under the federal statute. *See*, 47 U.S.C. § 251 (f). We find no indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry. In fact, 47 U.S.C. § 251 (a) and (b) make clear that all local exchange carriers, regardless of size, must interconnect with other carriers operating in their service territory. The recent amendments to RSA 374:22-f and RSA 374:22-g make New Hampshire law consistent with federal law on this point. RSA

374:22-g treats all New Hampshire ILECs, whether large or small, equally concerning competitive entry.

The 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition. 47 U.S.C. § 253. In an effort to support the important policy goal of promoting competitive telecommunications markets and to comply with federal statutes, the Commission's CLEC registration rules provide for an administratively efficient process for competitors to enter the local telecommunications market. *See*, Puc 431.01.

We reject Union's claims that RSA 541-A:39 requires us to give notice to the municipalities in which IDT seeks CLEC authorization. RSA 541-A:39 is triggered by actions which directly affect the municipality. In this case, IDT's business partner MetroCast already provides cable service and operates cable plant in the municipalities where IDT proposes to provide telephone services. We do not find the provision of telephone service over existing cable plant to cause any direct effect on these municipalities.

We also reject Union's reliance on RSA 374:22-e for its contention that a hearing is required whenever the Commission considers an application for CLEC authorization. RSA 374:22-e became effective in 1990. At that time, telephone franchise areas served by a telephone utility that provided local exchange service were permitted to be wholly exclusive of other providers. Subsequently, in 1995, RSA 374:22-g became effective. RSA 374:22-g requires all such telephone utility franchise areas to be nonexclusive, notwithstanding any other provision of law to the contrary. With regard to the instant docket, we therefore find that RSA 374:22-g supersedes RSA 374:22-e.[4]

[4] Because we find that neither RSA 374:22-e nor RSA 374:26 require notice and an opportunity for hearing in this docket, we are not persuaded by Union's argument that this matter constitutes a contested case pursuant to RSA 541-A:1, IV. Therefore, no final orders or findings are required pursuant to RSA 541-A:35. Any requirement for a final order pursuant to RSA 363:17-b is satisfied by the instant order.

B. Commission Rules and Rulemaking Authority

RSA 374:22-g, III provides the Commission with specific authority to promulgate rules to enforce the section and the Commission must act within the authority delegated to it by the legislature. *See, Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 689 (2008). When the Commission exercised the authority delegated to it by RSA 374:22-g and updated the rules in 2005, it balanced competing interests, including competition, fairness, economic efficiency, universal service, carrier of last resort obligations, and an ILEC's ability to earn a reasonable return and recover costs incurred to serve CLECs. Puc Part 431 strikes an appropriate balance among these various interests regardless of whether the ILEC service territory is large or small.

Consistent with RSA 374:22-g, the current rules support competition, fairness and economic efficiency by allowing for an administratively efficient process to register a CLEC and by eliminating unnecessary barriers to CLEC entry into ILEC service territories. In cases where the ILEC's costs exceed those of an efficient competitor, the development of a competitive market may cause the ILEC to either lose customers, or find ways to reduce costs,[5] but such a result is fully consistent with RSA 374:22-g. The carrier of last resort burden may be more expensive for small ILECs than for larger ILECs, but under the current federal statutory scheme, ILECs operating in high cost service areas are compensated for this obligation through the universal service fund (USF). *See,* 47 U.S.C. § 254. In fact, the ILEC at issue in this case, Union, received a total of approximately $1.135 million in federal high cost support in 2007.[6] In addition, ILECs can negotiate the price and terms of traffic exchange, as required by 47

[5] In recognition of the pressures on small ILECs created by competitive markets the legislature has provided for small ILECs to request pricing flexibility and less regulation. *See*, RSA 374:3-b.

[6] FCC, Universal Service Monitoring Report, CC Docket No. 98-202, 2007, Table 3-30, at 3-134.

U.S.C. § 251 (b)(5), to recover the costs incurred to serve a CLEC. This provides an adequate vehicle for Union to recover expenses incurred to benefit competitive providers.

The fact that small ILECs had exclusive service territories under state law at the time the CLEC rules were last updated in 2005 does not mean those rules should not apply equally to large and small ILECs now that RSA 374:22-g has been amended. RSA 374:22-g makes no distinction between small and large ILECs. We find no sound policy reason to promulgate separate rules for small ILECs, nor has Union given any in its request to rescind our registration of IDT. The reference to non-exempt ILECs in Puc 431.01(d) does not prohibit registration of CLECs in exempt ILEC service territories. To interpret Puc 431.01(d) as such a prohibition would be contrary to our statutory directive in RSA 374:22-g and would also be inconsistent with federal law.

C. Completeness of IDT Application

Puc 449.07 specifies the format of the CLEC Application for Registration. In particular, Puc 449.07(d) states that the "applicant shall list 3 primary telecommunications services the applicant will offer in New Hampshire." Union notes that the IDT application lists only a single service, "local exchange telephone service." Consequently, Union argues, IDT has not submitted a proper application for the Commission to consider. Union, however, ignores both the attachments that IDT filed with its application, and the rate service schedule IDT filed on the same date. Attachment "A" to IDT's application includes references to intraLATA toll service as well as local telecommunications service. Moreover, IDT's rate service schedule lists multiple telecommunications services including, but not limited to, local service, intrastate long distance and interstate long distance services.[7] The mere fact that these services were not listed

[7] Section 1 of IDT's rate service schedule also lists such services as voice mail, call trace and line blocking, all of which are services that satisfy the requirements of Puc 449.07(d).

on the lines provided in Section 3 of the application does not require denial of IDT's application. Given that the documents that IDT filed with the Commission satisfy the requirements of Puc 449.07(d), we find no basis for denying IDT's application.

D. Conclusion

Consistent with the enabling legislation, RSA 374:22-g, as well as federal law, we have developed an administratively efficient process for CLEC registration to compete in ILEC service territories. We find Union's arguments concerning the process of registering IDT in its service territory unpersuasive, and we find IDT's application to comply with the requirements of Puc 449.07(d). We further conclude that IDT's expansion of service into the Union service territory will be for the public good.

Based upon the foregoing, it is hereby

ORDERED, that Union's Motion to Rescind IDT's competitive local exchange carrier registration is **DENIED**; and it is

FURTHER ORDERED, that Union's Motion for Rehearing is **DENIED.**

By order of the Public Utilities Commission of New Hampshire this twenty-second day of May, 2009.

Thomas B. Getz Chairman	Graham J. Morrison Commissioner	Clifton C. Below Commissioner

Attested by:

Lori A. Davis
Assistant Secretary