STATE OF NEW HAMPSHIRE

SUPREME COURT

2010 TERM

No. 2009-0168
No. 2008-0432

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

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APPEAL PURSUANT TO RSA 541:6 FROM FINAL ORDER OF THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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# *AMICI CURIAE* BRIEF MEMORANDUM OF BRETTON WOODS TELEPHONE COMPANY, INC. DIXVILLE TELEPHONE COMPANY DUNBARTON TELEPHONE COMPANY, INC. GRANITE STATE TELEPHONE, INC. KEARSARGE TELEPHONE COMPANY MERRIMACK COUNTY TELEPHONY COMPANY

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STATE OF NEW HAMPSHIRE

SUPREME COURT

**Docket No. 2009-0168**
**Docket No. 2008-0432**

**Appeal of Union Telephone Company d/b/a Union Communications**

**BRIEF MEMORANDUM OF *AMICI CURIAE***

NOW COME *amici curiae* Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc., Granite State Telephone, Inc., Kearsarge Telephone Company and Merrimack County Telephone Company, all rural local exchange carriers ("RLECs"), by and through their attorneys, and submit the following Brief Memorandum addressing the question presented in the court's Order dated March 3, 2010.

In its Order, the court referenced the three factors in its balancing test for determining whether particular procedures satisfy the requirements of due process:

> (1) the private interest affected by the official action;
>
> (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
>
> (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

*See In the Matter of Stapleford & Stapleford*, 156 N.H. 260, 264, (2007); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The court observed that while the parties' briefs focused on whether Union has a constitutionally protected property interest at stake, the briefs did not address the other two prongs of the court's three-pronged test. Accordingly, it directed the parties to file brief memoranda addressing the following question:

If we accept Union's assertion that its right to realize a reasonable return on its

investment is entitled to constitutional protection, do the PUC's current procedures for authorizing more than one provider to provide telecommunications services in any service territory comport with due process, considering: (1) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (2) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail?

Each of these questions consists of two discrete issues, which the RLECs address in turn.

## I. The Risk Of An Erroneous Deprivation Of Such Interest Through The Procedures Used

The current competitive local exchange carrier ("CLEC") registration process under N.H. Admin. Rules Puc 431.01 involves a CLEC submitting a form in which it provides contact information for its officers and key personnel and information about its status as a CLEC in other states. The CLEC must submit a rate sheet and must represent that it provides basic telephone service. The only grounds for denial of the application are set forth in N.H. Admin. Rules Puc 431.02. Neither the information submitted to the Commission nor the prescribed grounds for denial references the incumbent or the impact on the incumbent. No public notice is given of the filing, the incumbent (such as Union) is not notified, no facts are elicited other than those contained in the form, and there appears to be no investigation conducted by the Commission regarding the representations therein.

As such, the inquiry related to market entry by the registrant is one-sided, superficial and essentially ministerial. Although the inquiry under RSA 374:22-g contains factors related to the incumbent carrier, the registration process only concerns itself with information pertinent to the registrant, with no regard to the incumbent's rights. Under these circumstances, the question is not whether this process risks an erroneous deprivation of Union's rights under 374:22-g -- the question is how such a process, in which the incumbent receives no notice and the impacts on the

incumbent receive no consideration, can possibly *not* result in an erroneous deprivation. The Commission received no evidence or information, either from the CLEC (Metrocast) or the incumbent (Union), from which the impact on Union could be determined.

These defects in the registration process, as applied to Union, become clear when the facts of this case are considered in light of the cases the court referenced in its Order, *i.e. Mathews* (in which the three part test was established) and *Stapleford*, as well other New Hampshire cases in the same vein. *See, e.g. In re Father 2006-360*, 155 N.H. 93, 94-96 (2007) (holding that absence of court-appointed counsel was not a violation of parent's due process rights because, among other things, parent could present evidence at hearing but did not have to carry the burden of proof); *Auger v. Town of Stratford*, 156 N.H. 64 (2007) (plaintiffs' due process rights were not violated, even though one zoning board member missed two hearings, since board member had visited site and reviewed applicable notes.)

Unlike this case, those decisions dealt not with whether the claimant's interests had been ignored, but whether the consideration that they did receive had been adequate. For example, in *Mathews*, the petitioner, deprived of disability benefits based on a self-completed questionnaire and a written doctor's opinion, had complained of the absence of an in-person hearing. The Supreme Court held that, even without a hearing, his due process rights had not been violated, since the question was a focused and easily documented decision, amenable to development of written facts, including the opinion of a disinterested doctor, and written rebuttal. The Court found that the risk of an erroneous decision was mitigated by a procedure in which the agency

> informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions."

*Mathews*, 424 U.S. at 346.

In *Stapleford*, which follows *Mathews*, children of a divorcing couple petitioned for party status in their parents' divorce. This court found that the children did not need to be parties, since their interests were competently represented by their guardian ad litem.

These and similar cases illustrate the fact that, while there is no single prescribed procedure, the interests of the claimant must be placed before the tribunal in some form or fashion in person, by proxy, or in writing.

> The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it. All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard to insure that they are given a meaningful opportunity to present their case.

*Mathews*, 424 U.S. at 348-349. Contrary to this dictate and applicable holdings of this court, Union received no notice of the case at all, and certainly no opportunity to submit evidence or arguments. Union's interests are not represented in any shape or form in the Commission's registration procedure. Consequently, erroneous decisions are highly probable.

## II. The Probable Value, if any, of Additional or Substitute Procedural Safeguards

When considering a CLEC application to provide service, RSA 374:22-g requires the Commission to consider, in addition to the interests of competition, a number of other factors including, among other things, universal service, carrier of last resort obligations, and the incumbent utility's opportunity to realize a reasonable return on its investment. These are subjects for which the incumbent carriers are uniquely, and in some cases exclusively, qualified to present evidence. As the RLECs stated in their initial brief, had Union and other RLECs been given the opportunity, they could have produced evidence that, contrary to the Commission's assumptions, USF funding does not fully compensate an RLEC for lost lines. Furthermore,

belying the Commission's assurances regarding the availability of reciprocal compensation, the RLECs could have explained that the necessary cost proceedings are overwhelmingly expensive and time consuming, and that regardless of the reciprocal compensation rate, *nothing* can be collected on lines that have been lost to other carriers.

The issue of lost lines is an increasingly critical one as well heeled competitors like Comcast and Time Warner expand further into the telephone business. Given notice and opportunity, Union could provide information to the Commission regarding the degree to which sunk costs become stranded costs when customers leave the network. They could offer testimony that once a transmission line is installed to a customer's premises, it is more or less a permanent fixture, since this network facility cannot be redirected to another customer if the current customer cancels service. Likewise, local exchange switches are configured for a certain number of customers and minutes-of-use, and cannot be incrementally reduced in size with the loss of a line. Union could also explain that the problem of stranded capital costs is compounded by the fact that there is little opportunity to reduce operational expenses when a line is lost. Because of their carrier-of-last-resort, *i.e.* universal service, obligations, incumbents such as Union and the RLECs cannot abandon physical plant assigned to a lost customer, since it must be kept available if the premises are transferred or if a lost customer decides to revert back to the incumbent.[1] Consequently, incumbents are required to maintain and restore downed lines, even for non-customers.

It goes without saying that loss of customers, which presents lost revenues without offsetting cost reductions, has a major impact on Union's rate of return and its ability to offer

[1] In fact, it can be argued that the RLEC's carrier of last resort obligation provides a competitive advantage to its CLEC competitors, because potential CLEC customers are assured that, with the RLEC as the eternal back-up, switching to the CLEC is a no-risk proposition.

universal service as the carrier of last resort. Issues like this go to the heart of the RSA 374:22-g decision factors, and they must be addressed *in conjunction and concurrent* with the CLEC application.

It is certainly no answer to suggest, as the State did at oral argument, that the incumbent can recover lost revenues by simply raising the rates charged to its remaining customers. This suggestion, made without any evidentiary basis, ignores the risk of customer attrition that would result from raising prices in the face of competition. This is an important consideration and, had Union not been deprived of the opportunity, it could have presented evidence regarding the detrimental impact of initiating a rate case to raise prices.

Clearly, the procedural safeguards necessary to protect the RLECs' interests are the ones that are already in place: notice and an opportunity to be heard in advance of a Commission decision. No "additional or substitute" procedures are possible or effective.

## III. The Government's Interest, Including the Function Involved

The state has various and conflicting interests in market entry for competitive telephone providers. On the one hand, it is clear on the face of RSA 374:22-g that the legislature considers competition to be an important, if not leading, consideration. "In determining the public good, the commission shall consider the interests of competition with other factors . . . ." On the other hand, as the RLECs indicated in their initial brief, competition is not the exclusive factor. In addition to the interests of competition, RSA 374:22-g directs the Commission to consider competition "with other factors" that are especially pertinent in RLEC territories, including universal service, carrier of last resort obligations, and the incumbent utility's rate of return. Both Congress and the General Court understood that there are important policy and practical reasons for placing some conditions on competitive entry into RLEC territories, and that an

unrestricted grant of authority may not always be in the public interest.

This court addressed this balancing of interests in a similar situation involving competitive entry into the banking industry. In *Appeal of Portsmouth Trust*, this court recognized that

> while it is of course true that a bank charter does not entitle the plaintiffs to a right to be free from competition, a bank charter does create a right to be free from *unlawful competition*. It follows that the [agency] may not grant an application to open a branch bank without affording due process to affected banks that may wish to challenge the application.

*Appeal of Portsmouth Trust*, 120 N.H. 753, 756-57 (1980) (emphasis supplied) (internal citations omitted). The same holds true in this case. Union should have been provided the opportunity to weigh in on the balance of lawful interests that the legislature has dictated in the statute.

The RLECs do not deny the tension inherent in this analysis. The benefits of competition are balanced against the necessity of universal service, and the interests of the incumbent carriers are pitted against those of their CLEC competitors. However, resolving this tension is the everyday duty of the Commission, one that it cannot avoid by simply ignoring all but one factor. Furthermore, this resolution must be conducted in a transparent manner. As the court held in *Portsmouth Trust,*

> although . . . the statute does not explicitly require the board to make findings concerning any of these factors, such a requirement is implicit in the direction to consider these factors. Otherwise there is no means by which a reviewing court can determine whether the board complied with the statute and considered each of the enumerated factors, or whether the evidence sustains the board's ultimate determination."

*Id.* at 759 (internal citations omitted).

## IV. The Fiscal and Administrative Burdens that Additional or Substitute Procedural Requirements Would Entail.

The interests at stake, however important to the claimant or the government, must be

balanced against the financial and administrative burdens involved in ensuring those interests. As the Supreme Court observed in *Mathews*, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Mathews*, 424 U.S. at 348. This was an issue in *Mathews*, where there was a concern that administrative hearings involving thousands of claimants would overload the system and add little to the written record. This court respected that concern in Stapleford, when it warned of "the chaos that would ensue if we were to hold that every mature minor has a due process right to intervene in their parents' divorce litigation." *Stapleford*, 156 N.H. at 265.

Unlike these cases, however, the procedural relief that the RLECs are requesting is nothing extraordinary or uncommonly burdensome. They are only asking for the statutorily prescribed adjudicative proceeding that is commonplace for the Commission, and which is the standard for many other commissions across the country.[2] It is also commonplace for state commissions to accept the intervention of incumbents in CLEC application proceedings, and there are numerous examples of proceedings in which the incumbent's concerns have influenced the public interest determination.[3] This is not to say that the incumbents have always prevailed

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[2] A cursory survey of neighboring states reveals that many require a docketed and/or publicly noticed application. *See, e.g.* Conn. Gen. Stat. §§ 16-247a through 16-247l; Code Me. R. 65-407 Ch. 280 §4; N.J. Admin. Code tit. 14, § 14:1-5; N.Y. Pub. Serv. Law § 99; *Entry Requirements for Competitive Local Exchange Carriers*, R.I. P.U.C. Docket No. 2411, Report and Order (Jul. 12, 1996); *Implementation of the Telecommunications Act of 1996*, Pa. P.U.C. Docket No. M-0090799, Implementation Reconsideration Order (Sep. 7, 1996). *But see,* Vt. Stat. Ann. tit. 30, § 231 (prescribing undocketed streamlined procedure tantamount to registration) and Mass. Gen. Laws ch. 159, § 19 (prescribing streamlined, but publicly noticed, procedure tantamount to registration). Note, however, that neither Massachusetts or Vermont have statutes that require findings comparable to RSA 374:22-g.

[3] *See, e.g. Application of Intelepeer, Inc.*, Ca. P.U.C. Application 09-10-008, Decision 10-02-020, 2010 WL 834460 (Feb. 25, 2010) (granting application to provide local exchange service, dismissing application to provide local exchange service in RLEC territories); *Application of Time Warner*, Mo. P.S.C. Case No. LA-2004-0133, Order Granting Certificate, 2004 WL 438527 (Mar. 2, 2004) (granting application, amended per stipulation with RLEC associations);

in their arguments, but nevertheless their concerns were heard and considered by the commissions.

The RLECs emphasize that they are not suggesting any enhanced or extraordinary procedures. The Commission's existing procedures are more than adequate to the task, provided that they are followed.

## CONCLUSION

Given that the interests of the incumbent, such as Union, are not considered when a CLEC registers to provide service in the incumbent's territory, it is highly likely that the Commission will make an erroneous determination under RSA 374:22-g. These interests must be considered at the time of the CLEC's original request, since it is impractical and unreasonable to remedy the damage to the incumbents after the fact. It is also in the public interest to adhere to procedures that follow the statute and protect the due process rights of incumbents such as Union. Even though fair competition can be beneficial, the legislature has determined that there is also benefit to the public in having a financially sound local telephone service provider committed to universal service and carrier-of-last-resort obligations. Moreover, the necessary procedures, besides being a statutory requirement, are ordinary and reasonable in light of standard administrative practices.

For the foregoing reasons, the RLECs respectfully request that this Honorable Court (i) invalidate the amended registrations of Metrocast and IDT and (ii) remand these proceedings to the Commission for deliberation consistent with its rules.

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*Application of RCN Telecom Services, Inc.*, Pa. P.U.C. Docket No. A-310554F0002, Order, 2007 WL 2325227 (Aug. 14, 2007) (granting application to provide local exchange services following settlement and withdrawal of protest by RLEC); *Tennessee Telephone Service, LLC dba Freedom Communications USA, LLC*, S.C. P.S.C. Docket No. 2004-211-C, Order No. 2004-567, 2004 WL 3050859 (Nov. 15, 2004) (granting application to offer local exchange services subject to stipulation with RLEC association).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the *Amici Curiae* Brief Memorandum of Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc., Granite State Telephone, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company:

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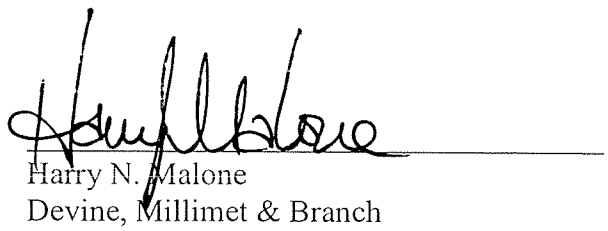

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