TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

State Cases

Federal Cases

Rules

Treatises

Other Authorities

AMICUS CURIAE BRIEF OF THE NEW HAMPSHIRE TELEPHONE ASSOCIATION

INTRODUCTION

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, Devine, Millimet & Branch, Professional Association, submit this Brief of *Amicus Curiae* pursuant to Rule 30 of the New Hampshire Supreme Court rules.

Like the Appellant, Union Telephone Company, ("Union"), the RLECs are New Hampshire corporations and public utilities as defined in RSA 362:2 and are regulated by the New Hampshire Public Utilities Commission ("Commission"). The RLECs provide telecommunications services to residential and business customers and access services to interexchange carriers for the provision of toll and long distance services. Like Union, each is an "incumbent local exchange carrier" as that term is defined at 47 U.S.C. §251(h) ("ILEC") and a "rural telephone company" as that term is defined at 47 U.S.C. §153(37). As rural telephone companies, the RLECs are provided with exemptions from certain obligations otherwise imposed on ILECs under 47 U.S.C. §251. *See* 47 U.S.C. § 251(f)(1), Appendix to Appeal, p. 79. New Hampshire ILECs that are not eligible for the exemptions provided under 47 U.S.C. §251(f) are defined under the Commission's rules N.H. Admin. Rule Puc. 402.33 as "non-exempt ILECs." Appendix to Appeal, p. 76. Each of the RLECs is a carrier of last resort in its respective service territory and bears the extra obligations and responsibilities attendant to this status.

The RLECs share Union's concerns that the decisions below are not in accordance with New Hampshire law and are contrary to the public interest. The legal issues at the core of the

Union Appeal are applicable to the RLECs, and for that reason, any decision of the Court will have a direct effect on the RLECs. The RLECs are submitting this brief as *amicus curiae* to ensure that the Court has the fullest understanding of the perspectives of other ILECs that will be affected by its decision.

By telephone conference confirmed in writing by electronic mail, counsel for Union has consented to the filing of this brief as *amicus curiae*. Counsel for MetroCast Cablevision of New Hampshire, LLC ("MetroCast") and counsel for IDT Telecom, Inc. have indicated that they do not object to the filing of this brief.[1]

The RLECs do not request oral argument.

QUESTIONS PRESENTED

The RLECs adopt the Questions Presented in the Initial Brief of Appellant.

STATEMENT OF THE CASE

The RLECs adopt the Statement of the Case in the Initial Brief of Appellant.

STATEMENT OF THE FACTS

The RLECs adopt the Statement of the Facts in the Initial Brief of Appellant.[2]

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[1] MetroCast and IDT Telecom, Inc., while not objecting to this filing, do not endorse the positions asserted by NHTA in this brief.

[2] To avoid duplication, this brief references appendices that are already in the record. These include the Appendix to Appeal of Union Telephone Co. ("Appendix to Appeal"), the Appendix to the Initial Brief of Petitioner-Appellant Union Telephone Co. ("Appendix to Union Brief") and the Appendix to this *amicus* brief ("App.").

STANDARD OF REVIEW

RSA 541:13 provides that an order or decision of the Commission cannot be set aside unless it is shown that it is "clearly unreasonable or unlawful." Any of the Commission's findings of fact regarding questions of fact properly before it are "deemed to be prima facie lawful and reasonable," and an order or decision of the Commission should not be set aside or vacated except for errors of law, "unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." RSA 541:13, App. at 3. In describing the standard of review of factual findings, this Court has stated that "our task is not to determine whether we would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." *Appeal of Anheuser-Busch Co.,* 156 N.H. 677, 679 (2008). According to this court, it is considered an error of law if there is an agency "[f]ailure to take into account relevant factors;" such failure "requires setting aside an administrative agency's order." *Bedford Bank v. State Bd. of Trust Co. Incorporation*, 116 N.H. 649, 652 (1976). "We have held that the presumption of lawfulness and reasonableness can be overcome by a showing that no evidence was presented to sustain the order." *Legislative Utility Consumers Council v. Public Utilities Comm'n*, 118 N.H. 93, 99 (1978).

Although the court reviews certain Commission orders deferentially in regard to factual and judgmental issues, *see Appeal of Conservation Law Foundation,* 127 N.H. 606, 616 (1986), this deference does not extend to the Commission's interpretation of the law. *See Appeal of State,* 138 N.H. 716, 719-20 (1994) (explaining that court no longer defers to statutory interpretation by New Hampshire Public Employee Labor Relations Board); *cf. Verizon New England, Inc.* 158 N.H. 693, 695 (2009).

With regard to an administrative agency's interpretation of its own rules, the Court has stated that:

> "We review the Board's interpretation of its administrative rules *de novo*, ascribing the plain and ordinary meanings to the words used and looking at the regulatory scheme as a whole and not piecemeal. Although we accord deference to the Board's interpretation of the rule, that deference is not absolute. We still examine its interpretation to determine if it is consistent with the language of the regulation and with the purpose the regulation is intended to serve."

Appeal of Kelly, 158 N.H. 484, 490-91 (2009) (citations omitted).

SUMMARY OF THE ARGUMENT

By granting authorization for MetroCast and IDT to commence operating as telephone public utilities within the service areas served by Union, the Commission disregarded state law and its own rules. Under RSA 374:22, prior Commission approval was required. When entertaining a petition for authority, the Commission is required by RSA 374:22-g to consider and make findings regarding at least seven factors (and more at its discretion), all of which are amenable to factual inquiry based on evidence presented and taken at a hearing pursuant to RSA 374:26. The Commission held no such hearings. Moreover, under RSA 363:17-b, these findings should have been (but were not) contained in final orders that identified the parties, their positions, provided a decision on each issue (including the reasoning behind such decision) and the concurrence or dissent of each Commissioner participating in the matter. Under constitutional principles of due process, N.H. Const. Part I Arts. 14 & 15, U.S.Const. amends. V & XIV, Union should also have been a party to the proceedings below and have had the right to be heard. Had this right been respected, Union would have informed the Commission's deliberations with substantial evidence that was not reflected in the initial approvals or in the Commission's *post hoc* justification for its decisions.

Furthermore, the Commission disregarded its own rules by processing MetroCast's and IDT's petitions in accordance with the registration procedure of N.H. Admin. Rule Puc. 431.01. That rule, on its face, is applicable only in service territories of *non-exempt* telephone companies as defined in N.H. Admin. Rule Puc. 402.33. Because Union is an exempt telephone company under federal law, the Commission was required to observe its traditional rules pertaining to notice, hearing and the issuance of a final order.

The Commission (and MetroCast) justified the Commission's actions by applying various rules of statutory interpretation that were inappropriate and irrelevant to the facts of this case. In reality, standard principles of statutory interpretation, properly applied, clearly establish that RSA 374:22-g must be implemented in concert with other statutes, including RSA 374:22 and 374:26, and that the Commission's decision was erroneously reached. This Honorable Court should invalidate the registrations of MetroCast and IDT and remand these proceedings to the Commission for deliberation consistent with its rules and applicable statutory requirements.

ARGUMENT

A. The Commission's Decision Was Not In Accord With Applicable Public Utility Law.

RSA 374:22 and 374:26 provide the starting point for this case. They state in relevant part:

> RSA 374:22,I. "No person or business entity shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore already exercised in such town, without first having obtained permission and approval of the commission."
>
> RSA 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."

RSA 374:22-g (Service Territories Served by Certain Telephone Utilities) provides 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.
>
> 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.

1) The Commission Did Not Make The Required Public Good Findings Based On Substantial Evidence.

The plain language of RSA 374:26 requires the Commission to make a finding of public good in order to approve the authorization "after due hearing." RSA 374:22-g provides further specificity regarding the finding of public good and prescribes factors to be considered by the Commission in determining whether entry is consistent with the public good. It requires that the Commission "find" and "determine" that an application is consistent with the public good. RSA 374:22-g,I. The terms offset by quotations in the previous sentence are legal terms of art that imply considerably more than merely arriving at an overall conclusion. A "finding" is a

"decision upon a question of fact reached as the result of judicial examination or investigation by a court, jury, referee, coroner, etc. *A recital of the facts as found.*" Black's Law Dictionary 632 (6th ed.) (emphasis supplied). "Determine" is a term that "implies judgment and decision after weighing the facts." *Id.* at 450. These requirements are in complete accord with RSA 363:17-b, which mandates "a decision on each issue . . ." and RSA 374:26, which requires that the finding be made "after due hearing."

RSA 374:22-g also carries the statutory imperative that the Commission *shall* "consider" a number of express and non-express criteria, a process that involves "a view to careful examination; to examine; to inspect. To deliberate about and ponder over." Black's Law Dictionary at 306. Many, if not all, of these criteria are amenable to factual inquiry and the taking of evidence. It is not reasonable to believe that the particular considerations regarding rates of return, universal service, and carrier of last resort obligations can be conducted without involving the incumbent carrier on whom these obligations lie.

MetroCast argued that no "formal findings" are required by RSA 374:22-g,[3] but this position flies in the face of the express imperatives contained in that statute. The Commission is directed to make findings and determinations on a number of specific criteria in a list which, by the terms of the statute, are not even all-inclusive. The criteria are not surplusage. It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A Sutherland, Statutes and Statutory Construction § 46.6 (7th ed.), App. at 8, *accord, Appeal of*

[3] Metrocast Cablevision of New Hampshire LLC Motion for Summary Affirmance ("Metrocast Motion") at 6.

Village Bank and Trust Co., 124 N.H. 492, 495 (1984); *Winnacunnet Cooperative School District v. Town of Seabrook,* 148 N.H. 519, 525-26 ("When construing a statute, we must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words.") The factors listed in RSA 374:22-g are obviously "relevant factors," to be taken into account or they would not be in the statute in the first place. "Failure to take into account relevant factors . . . requires setting aside an administrative agency's order." *Bedford Bank v. State Bd. of Trust Co. Incorporation*, 116 N.H. 649, 652 (1976).

The Commission claims that it has the "discretion to permit competitive local exchange carriers to do business within the service territory of Union Telephone," *see* Order Denying Motion for Rehearing ("Order"), Appendix to Union Brief, at 41, but it is an abuse of this discretion to render the dictates of RSA 374:22-g into a ministerial function, which is what it has done by applying Rule N.H. Admin. Puc. 431.01 registration process to the Union service territory. This approach conflicts with its statutory charge to make the prescribed findings and determinations and its obligation to produce reviewable decisions. "The Commission is nevertheless under an obligation to set forth its methodology and findings fully and accurately in order that this court may undertake meaningful judicial review of its methods, findings and order." *Legislative Utility Consumers' Council v. Public Service Co., et al.*, 119 N.H. 332, 341 (1979). Moreover, "the law demands that findings be more specific than a mere recitation of conclusions." *Society for Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 174 (1975). It is also consonant with the legislative history of RSA 374:22-g as originally enacted in 1995, which includes in handwritten form the comments of Representatives MacGillivray and Bradley speaking for the Science, Technology & Energy Committee. In their comments, they stated "[t]his bill allows increased competition for local telecommunications

services. New Hampshire will be better positioned to move forward with the national trend toward additional competition in the telecommunications industry. *The Public Utilities Commission will still have to find each proposed change to have public benefit.* All affected telecommunications providers supported this bill." Report of the Science, Technology & Energy Committee, App. at 4 (emphasis added).

The Commission appears to be relying on the "notwithstanding any other provision of law to the contrary" language in RSA 374:22-g to preclude the applicability of RSA 374:22 and 374:26. However, that clause is simply a qualifying statement in a statute declaring expressly that telephone utility franchises are non-exclusive, and merely codifies this Court's previous holding that utility franchises generally are non-exclusive under RSA 374:22.[4] *See, Appeal of Public Service Co. of New Hampshire,* 141 N.H. 13 (1996). However just as this Court's holding did not have the effect of entirely countermanding or nullifying the provisions of any other statute, neither does this opening clause. RSA 374:22 and 374:26 are not laws "to the contrary" to be excluded from application to telephone utilities, but instead have considerable bearing on the issues of this case.

In the final analysis, "[r]ules and orders adopted by state agencies may not add to, detract from or in any way modify the statutory law." *Kimball v. N.H. Board of Accountancy*, 118 N.H. 567, 568 (1978). If the Commission has a statutory mandate to consider several factors, it must consider those factors. If the Commission has a mandate to hold a hearing, it must hold a hearing. It cannot short circuit the process with a ministerial registration process. As this court

[4] Contemporaneously with the adoption of the "notwithstanding" language in RSA 374:22-g, the Legislature repealed RSA 374:22-f, which did have provisions permitting exclusivity in the territories of small local exchange carriers. Appendix to Union Brief, at 8-9.

has also held, "rule-making authority is granted to permit [agencies] to *fill in details* to effectuate the purpose of the statute," *id.*, not to strip them out.

2) The Commission did not Conduct Hearings or Issue Final Orders.

It is well settled law in New Hampshire that a statute must be interpreted in the overall context of the applicable statutory scheme and not in isolation, *see State v. Langill*, 157 N.H. 77, 84 (2008) citing *Bendetson v. Killarney, Inc.*, 154 N.H. 637, 641 (2006) and thus RSA 374:22-g should be read in conjunction with other subsections of state public utility law, including RSA 374:26 (requiring hearings on public utility applications) and RSA 363:17-b (requiring a final order on all matters). RSA 374:22 requires prior Commission approval for a public utility to commence business. RSA 374:26 provides, in part that

> [t]he 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. (emphasis supplied).

However, in the Order, the Commission concluded that a hearing under RSA 374:26 was not required in this case. Its position, supported by MetroCast, relies primarily on the contention that principles of statutory construction dictate that RSA 374:22-g preempts, supersedes, or otherwise is not subject to other provisions of public utility law.

This contention ignores one of the primary principles of statutory interpretation, which is that interpretation *may not be necessary* in the first place. Principles of statutory interpretation are only invoked when there is a conflict or ambiguity. "If the language is plain and unambiguous, we need not look beyond the statute for further indications of legislative intent." *Ireland v. Worcester Ins. Co.,* 149 N.H. 656, 661 (2003). "A frequently encountered rule of statutory interpretation asserts that a statute, clear and unambiguous on its face, need not and

cannot be interpreted by a court and that only statutes which are doubtful of meaning are subject to statutory interpretation." 2A Sutherland, Statutes and Statutory Construction § 45.2 (7th ed.), App. at 36. Here, there is no conflict or ambiguity.

Speaking generally, the Commission asserted that "RSA 374:22-g instructs us to implement the section consistent with federal law and *notwithstanding inconsistent state laws*," Order, Appendix to Union Brief, at 41 (emphasis supplied). However, this *proviso* does not apply to all of RSA 374:22-g, and the Commission's interpretation is overbroad. RSA 374:22-g(I) provides that "to the extent consistent with federal law and notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a utility that provides local exchange service . . . shall be nonexclusive." This sentence is self contained. The *proviso* regarding contrary (not merely "inconsistent") law is narrowly targeted and applies only to the subject of exclusive service territories. It is not a sweeping mandate to overturn RSA Title 35 wherever the Commission discerns "inconsistencies" within sub-sections of RSA 374:22-g. This is power reserved to the General Court.

The Commission further explained that "RSA 374:22-g is the more recent and more specific statute and should control in cases regarding telephone franchises." Order, Appendix to Union Brief, at 42. It also asserted that "RSA 374:22-g . . . operates 'notwithstanding any other provision of law to the contrary' and thus prevails over any conflicting rule." *Id.* However, there is no conflict between this section and the RSA 374:26 hearing requirement. RSA 374:22-g is silent as to hearings, and thus cannot be "more specific" in that regard. MetroCast invokes *expressio unius*[5] to conclude that this silence implies that the hearing requirement is inapplicable. MetroCast at 6. However, this usage is inapt. *Expressio unius* does not apply to situations where

[5] *Expressio unius est exclusion alterius*: inclusion of one thing indicates the exclusion of the other.

a provision is *silent*, as opposed to excluded. It would have been one thing if RSA 374:26 had listed the particular sections that it applied to; then, *expressio unius* might apply to any excluded ones. However, when a statute covers *all* circumstances, as RSA 374:26 does, it is not necessary to further itemize each circumstance, nor can silence countermand this prescription. In fact, the maxim *expressio unius* is much more supportive of Union's interpretation, since "[a] statute that provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way." 2A Sutherland, Statutes and Statutory Construction § 47.23 (7th ed.), App. at 54. In this case, state law provides that all permissions to operate must be "after due hearing." Absent an express provision to the contrary, this applies to all cases.

The two statutes, both contained under the heading of "Telephone Utilities Service Territories," are not in conflict and in fact are complementary. RSA 374:22 prescribes the general requirement for Commission approval to commence utility service. RSA 374:26 sets the standard for approval (the finding of public good) and requires that a hearing be conducted as part of the process. RSA 374:22-g further identifies a non-exclusive list of particular factors that the Commission must consider when making its public good determination. These provisions work in concert, which comports with the "whole act rule" that the court "must view the disputed language within the context of the whole statute . . . ." *Pandora Industries, Inc. v. State Dept. of Revenue Admin.*, 118 N.H. 891, 894 (1978) (citing *Plymouth Sch. Dist. v. State Bd. of Ed.*, 112 N.H. 74 (1972); 2A Sutherland Statutes and Statutory Construction § 46.05 (4th ed. C. Sands, 1973)). Sutherland further instructs that "the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail." 2A Sutherland Statutes and Statutory Construction § 46:5 (7th ed.), App. at 83. In this case, it is much more harmonious to construe that a general hearing requirement for Commission authorization applies to all requests for

authorization (unless there is an express *proviso* otherwise), than to assume that complete silence regarding a hearing somehow countermands the general requirement.

An obvious corollary of the whole act rule is that one provision of a statute should not be interpreted in such a way as to negate other provisions of the statute. "A statutory construction which results in the nullification of one part of a statute by another is impermissible, and violates the rule that all parts of a statute are to be harmonized with each other, as well as with the general intent of the statute." *Rangolan v. County of Nassau*, 749 N.E.2d 178, 183 (N.Y. 2001), App. at 136. Unless RSA 374:22-g expressly provided that the hearing requirements of RSA 374:26 do not apply, there is no way to conclude that the hearing requirement is negated.

For all of the reasons discussed in the previous paragraphs, there is also no reason to conclude that RSA 374:22-g preempts another provision of Title 35, the requirement of a final order. RSA 363:17-b requires the issuance of a final order by the Commission on all matters presented to it. Appendix to Appeal, at 63. That statute requires that such orders reflect, among other things, the parties, the position of the parties, a decision on each issue (including the reasoning behind such decision) and the concurrence or dissent of each PUC Commissioner participating in the matter. The Commission produced no such final order, and declined in the Order to address Union's objection to this absence. MetroCast maintains that the Order itself met the requirements of 363:17-b, stating that the Order "plainly meets all of the formal requirements for Commission orders as listed in the statute." Metrocast at 7. This is patently impossible, however. That statute requires "a decision on each issue including the reasoning behind the decision," but as described in the previous section, the Commission conducted no analysis upon which a decision could have been made and accordingly documented.

Inasmuch as a hearing was required in this case, it is also true that Union, as well as the RLECs, would have been parties eligible to participate, given that there is a property interest at stake. In determining whether the requirement of due process has been met under Part I, Article 15 of the New Hampshire Constitution, this Court considers three factors:

> First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Appeal of Office of Consumer Advocate, 148 N.H. 134, 138 (2002). "Private interests" can be either liberty or property interests, *id.*, and Union had property interests inherent in its ability to realize a reasonable rate of return and recover expenses that benefit competitors. "Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another." *U.S. v. Abilene & S. Ry. Co.*, 265 U.S. 274, 289 (1924). Consequently, Union had a right to notice and the opportunity to be heard.

3) The Commission's Interpretation of Federal Law is Incorrect.

The essence of the Commission's position seems to be that its decisions are justified because they are in accordance with federal law and policy. However, the Commission's interpretation of the Communications Act is incomplete and incorrect.

There are a number of references to federal law and policy in the Order, such as "[s]tate and national policies encourage competition in local telecommunications service," Appendix to Union Brief, at 42, and "[i]n 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." *Id.* In particular, the Commission has found "no

indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry . . . . [T]he 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition." *Id.*, citing 47 U.S.C. § 253. Judging from the theme of the Order, Commission has accepted this as an unrestricted and unconditional mandate to permit competitive entry under any circumstance, "notwithstanding any other provision of law to the contrary" or "conflicting rule." Order, Appendix to Union Brief, at 45.

This interpretation is much too absolute. 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. Indeed, on its face, RSA 374:22-g says the interests of competition are not absolute, but *shall* be considered "with other factors" that are especially pertinent in RLEC territories.

The Commission draws its support primarily from the 47 U.S.C. §253 prohibition against barriers to entry, but it has entirely overlooked subsection (f) of that statute, which does permit state commissions to place conditions on competitive entry into rural markets. In particular, Section 253(f) provides that the Commission can grant authority in RLEC territories on condition that the new entrant provide all of the services, to all customers, that are supported by federal universal service support mechanisms. Appendix to Union Brief, at 10. This ensures that the benefits of new competition redound to *all* customers in the territory, not just those that a competitor cherry-picks from the RLEC. Furthermore, Section 253(b) permits the Commission to impose requirements to protect universal service in general. *Id.* Not coincidentally, protection of universal service is one of the criteria that the General Court established for determining the public good under RSA 374:22-g. Again, there is nothing to suggest that the Commission cannot

meet the requirements of *both* federal law and the New Hampshire statutory provisions. It was error for the Commission to do otherwise.

4) The Commission's Decision is not Supported by Proper Factual Findings.

In the absence of any hearing, findings of fact and final order, the Commission enunciated in the Order a handful of factual conclusions that were introduced for the first time. It concluded that Union's burden of being the carrier of last resort might be disproportionate to that of a large ILEC, but that this was mitigated by funds received through the universal service fund ("USF"). *See* Order, Appendix to Union Brief, at 44. It also concluded that an "adequate vehicle" for Union to recover costs was negotiation of the price and terms of traffic exchange with CLECs, as required by the reciprocal compensation provisions of 47 U.S.C. § 251(b)(5). *Id.*

These two factual findings were made without evidence and without notice and opportunity for Union to be heard, and at a point of the proceeding where Union had no opportunity to rebut these "findings." To the extent that the findings amounted to official or administrative notice, such notice was taken in the absence of the prescribed procedures. RSA 541-A:33,VI, App. at 2; N.H. Admin. Rule Puc. 203.27, App. at 1 "If an agency takes notice of facts, it must give the parties advance notice and the opportunity to contest such facts." *Petition of Grimm*, 138 N.H. 42, 53 (1993). However, important determinations regarding the essentials of Union's business were made without giving Union notice of this undertaking, nor the opportunity to present evidence and provide explanation.

For example, 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. The Commission could have been reminded that high cost loop expenses are partially recovered in access charges, which would decline as lines are lost.

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.

All of these considerations directly impact the RSA 374:22-g criteria of universal service, carrier of last resort obligations, and return on investment. These factors were extremely important and relevant. The Commission's actions denied the RLECs the opportunity to present substantial and material evidence related to express statutory criteria.

B. The Commission Disregarded its Rules by Using the Registration Process in the Territory of Union, an Exempt ILEC.

The Commission claimed that its issuance of CLEC registrations to Metrocast and IDT were fully in accordance with its rules. Rule 431.01(d) provides that "[u]nless 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." (emphasis supplied). However, Union is an exempt ILEC, and thus the Rule 431.01 registration process by its express terms does not apply in its service territory. The Commission concluded, however, that the "Part 431 rules do not contain any express prohibition on registering CLECs in non-exempt (*sic*) ILEC service territories. The reference to non-exempt ILECs in Puc 431.01(d) does not prohibit registration of CLECs in non-exempt (*sic*) ILEC service territories." Order, Appendix to Union Brief, at 45. The Commission has it backward, and this is a situation where *expressio unius* does indeed apply – that which is not permitted is prohibited. "[W]here a form of conduct, the manner of its performance and operation, and the *persons and things to which it refers* are designated, there is an inference that all omissions should be understood as exclusions." 2A Sutherland, Statutes and

Statutory Construction § 47.23 (7th ed.), App. at 54 (emphasis supplied). N.H. Admin. Rule Puc. 431.01(d) expressly refers to the territory of non-exempt LECs. There would be no reason to include that term if the registration process was available in both exempt and non-exempt territories. The rule would instead just be silent on the issue.

MetroCast comes close to asserting that RSA 374:22-g flat out repealed N.H. Admin. Rule Puc. 431.01, but its arguments are unpersuasive. MetroCast asserts that applying Rule Puc. 431.01 to all service territories is a "reasonable policy determination" deserving deference, Metrocast at 5, but fails to explain how this excuses an *ad hoc* rule change. It relates how the "text in RSA 374:22-g . . strengthened the Commission's conclusion that it permissibly could apply the PUC 431 rules to Union," MetroCast at 5, but this is weak support; "strengthening" falls far short of the statutory mandate that MetroCast implies.

The rulemaking history of this rule is also material on this point. Within two months of the effective date of RSA 374:22-g, the Commission filed a Rulemaking Notice with the Joint Legislative Committee on Administrative Rules ("JLCAR") proposing an amendment to N.H. Admin. Rule Puc. 431.01 to remove the word "non-exempt" from the rule so that the registration process would thereafter apply in all LEC territories. Appendix to Union Brief, at 12. Later, in March 2008, it filed a Final Proposal to effect this change. Appendix to Union Brief at 18. One month later, however, the Commission filed a Conditional Final Proposal on April 15, 2009 in which it withdrew the proposed deletion of the words "non-exempt" from N.H. Admin. Rule Puc. 431.01, thus leaving it unchanged. Appendix to Union Brief, at 29. The Commission stated the withdrawal was due to "questions arising concerning whether the proposed form of Puc 431.01 is consistent with RSA 374:22-g." *Id.* Consequently, the only authority on this issue

resides in RSA 374:22-g which, as the RLECs have explained above, precludes a simple registration process.[6]

[6] In the alternative, Metrocast asserts that in absence of a rule "state precedent supports the Commission's ability to respond to a statutory change on a case-by-case basis pending revisions to the applicable regulations." Metrocast at 9 (citing *Stuart v. State, Div. for Children and Youth Services*, 134 N.H. 702, 705 (1991)). However, this is not the holding of that case. *Stuart* did not involve the revision of an *existing* rule, it involved the promulgation of a *new* rule. Thus, it addressed an agency's authority to enforce a statute in the absence of a rule, not to disregard an existing rule pending its revision. Furthermore, the enabling statute was *expressly* mandatory, even in the absence of rules. "We do not construe this language to require an initial rule to carry out what the statute demands on its face." *Id.* In any event, a case by case approach would mean a process conforming to the requirements of RSA 374:22-g, which was not what was done here. In the absence of any change in N.H. Admin. Rule 431.01, the Commission must follow the rule as is. "The law of this State is well settled that an administrative agency must follow its own rules and regulations." *In re Town of Nottingham*, 153 N.H. 539, 555 (2006). Furthermore, "an agency may not undertake *ad hoc* rulemaking." *Appeal of Nolan*, 134 N.H. 723, 728 (1991). If a Commission rule restricts the registration process to non-exempt service territories, the Commission cannot disregard this rule, notwithstanding policy implications or the interest of an "administratively efficient process." Order, Appendix to Union Brief, at 42.

CONCLUSION

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.

Respectfully submitted,

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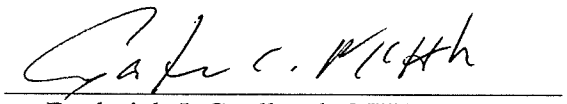
PROFESSIONAL ASSOCIATION

Date: October 19, 2009

By: 

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