STATE OF NEW HAMPSHIRE
SUPREME COURT

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

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

SUPPLEMENTAL REPLY MEMORANDUM
OF METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

Introduction

Appellee MetroCast Cablevision of New Hampshire, LLC ("MetroCast") filed an April 2, 2010 Supplemental Memorandum ("MetroCast Supp. Brief") pursuant to the Court's March 3, 2010 procedural order ("Order"). MetroCast hereby replies as follows to arguments raised in the Supplemental Memoranda filed by Appellant Union Telephone Company ("Union" and "Union Supp. Brief"), Amicus New Hampshire Telephone Association ("NHTA" and "NHTA Supp. Brief"), and Appellee Public Utilities Commission ("Commission" and "Commission Supp. Brief"). MetroCast incorporates by reference the discussion in the MetroCast Supp. Brief (at pp. 1-2) of the scope of the Court's request for supplemental briefing contained in the Order, as if restated herein.

Argument

I. The Supplemental Briefs Identified No Risk of an Erroneous Deprivation of Property Interests that Mandated a Hearing.

The Supplemental Briefs filed by Union and the Amicus, NHTA, focus entirely on the lack of participatory role for rural incumbents in the PUC 432 nonadjudicative entry registration process and the purported advantages of an adjudicative hearing

process in avoiding an alleged deprivation of Union's rights. Union Supp. Brief, pp. 2-4; NHTA Supp. Brief, pp. 2-6. Their arguments fail to demonstrate that an adjudicative hearing is required as a matter of constitutional due process under the second Mathews v. Eldridge factor.[1] Accordingly, Union's challenges to the certifications of MetroCast and IDT America, Corp. ("IDT") should be dismissed and the certifications affirmed.

The Union and NHTA Supplemental Briefs ignore the many "opportunities" at "meaningful" times and manners[2] for seeking relief outside of the registration process regarding adverse impacts from competitive entry. These vehicles include the Commission rehearing process with respect to an issued entry registration, development of rates and other provisions during traffic exchange and interconnection negotiations and arbitrations, federal requests for universal service funding, petitions to the Commission to enact changes to existing regulatory provisions, petitions to enact an alternative regulation plan, and appeals and other requests for judicial relief.[3] The availability of these administrative and legal procedures for Union to present its concerns alleging adverse impacts on investment returns due to lawful competitive entry easily satisfies constitutional due process standards.[4]

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[1] See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The three factor test balances "(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."

[2] Procedural due process requires "'an opportunity . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (citations omitted; emphasis in original). See also MetroCast Supp. Brief at pp. 3-6; Commission Supp. Brief at pp. 5-7; Riblet Tramway Co., Inc. v. Stickney, 129 N.H. 140, 148 (1987) (noting that "fundamental fairness" is required to comport with due process).

[3] See MetroCast Supp. Brief at pp. 3-6.

[4] Furthermore, even though an incumbent is sure to learn about a particular competitive entry on a timely pre-entry basis during network traffic exchange and/or interconnection talks and proceedings (see

The New York Public Service Commission docket discussed extensively by Union actually undercuts Union's own claims of a due process violation.[5] Instead of imposing a burdensome pre-entry adjudicative hearing requirement that stifled competition before it could start, the New York Public Service Commission adopted an alternative regulation plan that afforded regulatory relief commensurate with legitimate post-competitive entry adverse impacts.[6] Union has comparable administrative recourse available under RSA 374:3-b; moreover, Union, NHTA and any NHTA member can petition for a similar individual company or state-wide alternative regulation mechanism at any time.

II. The Government Interest in Fostering Competition and Avoiding Resource-Draining Proceedings Far Exceeds the Limited Additional Benefits of a Mandatory Adjudicative Process on All Entry Requests.

The Commission and MetroCast have demonstrated to this Court their concerns that a resource-intensive adjudicative proceeding to litigate the potential impacts on a rural incumbent from each entry application will impede or even block the delivery of competitive telecommunication services into New Hampshire's rural areas and harm consumers.[7] In evaluating the third Mathews factor, the significant public interest in

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MetroCast Supp. Brief at pp. 4-5; 47 U.S.C. § 253), MetroCast supports the Commission's policy decision on a going forward basis to notice publicly on the Commission's website all future requests for competitive registration. See Commission Supp. Brief at p. 2, note 1.

5 Union Supp. Brief at pp. 2-3 (discussing NY PSC Case No. 07-C-0349, In the Matter of Examining a Framework for Regulatory Relief, Order Adopting Framework (March 4, 2008)) (hereinafter "NYPSC Order"), reproduced in Appendix to Supplemental Memorandum of Petitioner-Appellant, pp. 1-31 (hereinafter cited as "Union Supp. App. 1-31").

6 Union Supp. App. 3, 12-15, 17-18 (NYPSC Order, pp. 3, 12-15, 17-18) (discussing competitive impacts on 29 rural incumbents through 2007 and establishing an alternative pricing scheme for rural incumbents where, inter alia, at least 69% of their customers have at least two competitive options). See also Section I infra (discussing New York's limited competitive telephone entry procedures).

7 MetroCast Supp. Brief at pp. 8-10; Commission Supp. Brief at p. 7.

fostering competition and minimizing resource-draining adjudicative proceedings on all telecommunications entry requests far exceeds the limited benefits of additional procedures.

Union's principal argument is that the Commission's experience with 165 cases in the Verizon territories in an adjudicative hearing "demonstrates that the PUC would not incur undue fiscal or administrative burdens in providing Union with notice and opportunity for hearing in these cases."[8] Union ignores that what turned out to be a streamlined, paper-only process in the early days of telecommunications competition in New Hampshire resulted from Verizon's corporate decision not to request hearings or offer evidence on any entry requests. As evident by this appeal and related proceedings at the Commission, Union and NHTA to date have declined to adopt the same policy. If their legal argument is adopted, Union and other rural incumbents would retain the ability and incentive to forestall competition by initiating complex rate case-like adjudicative proceedings regarding the impact on their costs and revenues of each competitive entry request.[9] Hence, replacing what has been a streamlined paper-only process with a right to a full adjudicative proceeding would create new fiscal and administrative burdens on the Commission, new telecommunications entrants and other affected parties.

Union also (correctly) claims that the one rural entry request prior to the 2008 amendments to RSA 374 was resolved without the need for a public evidentiary hearing, thereby implying that the Commission and parties experienced only minimal burdens

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[8] Union Supp. Brief at pp. 4-6; see also Union Supp. Brief at pp. 7-9 (listing the 165 approval orders).

[9] This would be contrary to the language and policy of the federal Communications Act. See 47 U.S.C. § 253 (preempting local entry barriers to telecommunications competition). Section 253 is reproduced in Appendix to Supplemental Reply Memorandum of MetroCast Cablevision of New Hampshire, LLC, filed herewith, at p. 1 (hereinafter cited as "MetroCast Rep. App. 1").

associated with an adjudicative process.[10] Union, however, disingenuously understates the extraordinary burdens in time and resources that were devoted by the Commission, Comcast, Office of Consumer Advocate ("OCA"), TDS Telecom Companies, NHTA (which intervened) and Union (which intervened) during the lengthy, year-plus long, adjudicative process that led to the February 6, 2009 entry order, including the following actions and events:

- Comcast's filing of an application package in December 2007.
- Follow up Comcast and Commission Staff filings.
- Entry of an order nisi granting Comcast's request for a certificate.
- Review by Commission staff and entry of an order suspending the order nisi and scheduling a pre-hearing conference.
- Petitions to intervene filed by NHTA, TDS Companies, Union and segTel, Inc., and notification of participation in proceedings by the OCA.
- Objection of Comcast to intervention petitions.
- Pre-hearing conference at the Commission.
- Filing of initial briefs by NHTA, TDS Companies, Union, Comcast and the OCA.
- Filing of Comcast reply brief.
- Entry of Commission order granting a hearing on August 18, 2008 (later waived by agreement of the parties).
- Written testimony filed by NHTA and TDS Companies (one witness) and Comcast (two witnesses).
- Technical Session to clarify the issues in dispute.
- Additional briefs filed by NHTA, TDS Companies, Union and Comcast.
- Reply briefs filed by NHTA, TDS Companies, Union and Comcast.
- Post-briefing motions by several parties to supplement the administrative record.
- Entry of order granting Comcast authority on February 6, 2009.
- Joint motion for rehearing and reconsideration by NHTA and TDS Companies.
- Opposition to rehearing and reconsideration motion by Comcast.
- Final April 21, 2010 Commission decision denying rehearing and reconsideration.[11]

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[10] Union Supp. Brief at p. 5 (discussing Commission Docket No. DT 08-013 (Comcast Phone of New Hampshire Request for Authority to Provide Local Telecommunications Services)).

[11] Union Supp. App. 32-54 (Order, Docket No. 08-013 (February 6, 2009)). The Commission has a link to all of the activities of the parties in the DT 08-013 docket at <http://www.puc.nh.gov/Regulatory/Docketbk/2008/08-013.htm > (last viewed on April 21, 2010).

If this is the type of agency process that the Commission and new entrants can expect to face if Union's arguments prevail, the resources of the Commission and new entrants will be taxed to their utmost and the Commission can be rightly concerned whether New Hampshire's business and residential customers in rural areas ever will see the benefits of vibrant telecommunication competition.

For its part, NHTA makes two main points tied to the government interest. It first argues that an adjudicative hearing requirement in CLEC entry request cases is "standard for many commissions across the country."[12] This is simply not correct, at least in states near New Hampshire. To make the record clear and to clarify certain misstatements in NHTA's "cursory review" of other states,[13] the applicable procedures in the states closest to New Hampshire are summarized as follows:

Vermont: Nonadjudicative docketed registration form process for obtaining a Certificate of Public Good ("CPG") with hearing only at the Public Service Board's discretion.[14]

Maine: Nonadjudicative docketed application process for obtaining a Certificate of Public Convenience and Necessity with no express intervention or hearing requirements.[15]

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[12] NHTA Supp. Brief at p. 8 n. 2.

[13] NHTA argues in a footnote (at p. 8 n. 2) that based on its "cursory review," many entry applications are "docketed and/or publicly noticed." Even if true (and despite NHTA's representations it is not true for Massachusetts, as discussed below), the fact that an entry request is docketed or publicly available on a website does not imply an adjudicative process, as is demanded by Union in this appeal.

[14] E.g., MetroCast Rep. App. 2-7 (Order, Petition of Bellerud Communications, LLC for a CPG to operate as a provider of telecommunications services in Vermont, including service to the local exchange, PSB Docket No. CPG No. 919-CR (March 31, 2010), at pp. 2-4 (summarizing history of the Board's regulation of telecommunications entry and making clear that since the Board has a longstanding policy of not using the entry process to protect existing providers by limiting or eliminating competitors, relying in part on the federal prohibition against entry barriers in 47 U.S.C. § 253)); see MetroCast Rep. App. 8 (V.S.A Title 30, § 231 (supporting streamlined entry process)). Links on the former Public Service Board website to CPG application materials and resources can be found at http://www.state.vt.us/psb/application_forms/cpg.spm (last viewed April 23, 2010).

Massachusetts: Nonadjudicative, non-docketed application process for obtaining a Statement of Business Operations.[16]

Rhode Island: Nonadjudicative and partially docketed process in which applications are submitted to the Division of Public Utilities and Carriers for review and the Division makes a recommendation to the Public Utilities Commission ("RIPUC") to approve or reject an application.[17]

Connecticut: Adjudicative docketed process by statute but hearings in uncontested cases are waived,[18] and burdens are minimal because Connecticut has no rural ILECs and entry requests have not been challenged for years.

New York: Nonadjudicative application process for a Certificate of Public Convenience and Necessity ("CPCN") that is automatically granted within 90 days unless the Commission exercises discretion to conduct a proceeding and issue a written order.[19]

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[15] MetroCast Rep. App. 13-25 (Code Me. R. 65-407 Ch. 280, § 4 (Approval Required)). The Chapter 280 rules do not provide for public notice or an opportunity for intervention on an entry application. Information on the Maine PUC website regarding the telecommunications entry process can be found at <http://www.maine.gov/mpuc/telecom/archive/telecommunications/appl_ltr.htm>

[16] See MetroCast Rep. App. 26-36 (Order, Entry Regulation, D.P.U. 93-98 (1994)). Information on the Department of Telecommunications and Cable website relative to telecommunications entry can be found at <http://www.mass.gov/eoca/docs/dte/telecom/marketentry/73geninfo.pdf> (last viewed on April 23, 2010). This process is not docketed or publicly noticed, contrary to the claim in the NHTA Supp. Brief (at p. 8 n. 2).

[17] See MetroCast Rep. App. 37-38 (Report and Order, In Re Entry Requirements for Competitive Local Exchange Carriers, Docket No. 2411 (1996) (establishing minimal certification requirements on CLECs in light of the prohibition of entry barriers in 47 U.S.C. § 253(a) and other factors)). Information on the RIPUC website regarding the application process can be found at <http://www.ripuc/utilityinfo/telecom/filingreq.html>

[18] See MetroCast Rep. App. 39-40 (Conn. Gen. Stat. § 16-247g(a)(1)); see also, e.g. MetroCast Rep. App. 41-49 (Decision, Application of MetroCast Communications of Connecticut, LLC for a Certificate of Public Convenience & Necessity to Provide Facilities-Based and Resold Local Exchange and Other Telecommunications Services, Docket No. 07-07-23, at p. 1 (August 22, 2007) (construing Conn. Gen. Stat. § 16-247g(a)(1) to provide that a hearing in the docket was not necessary)).

[19] See MetroCast Rep. App. 50 (NY Public Service Law, § 99(1)). Information on the NYPSC telecommunications application process can be found at < http://www.dps.state.ny.us/cpcn.htm > (last viewed on April 23, 2010).

NHTA also argues that "it is commonplace for many state commissions to accept the intervention of incumbents in CLEC proceedings..." and that, while such participating incumbents did not necessarily prevail, "their concerns were heard and considered by commissions."[20] As pointed out in the Commission and MetroCast Supplemental Briefs and supra, however, Union had ample opportunities through the rehearing process, interconnection proceedings, and other forums to ensure its concerns would be "heard and considered" by the Commission, including the Commission's ability to initiate an adjudicative proceeding as a discretionary matter.[21] These opportunities are more than adequate to meet minimum constitutional requirements in light of the potential for competitive harms and federal entry barrier preemption associated with a mandatory adjudicative hearing requirement.

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[20] Id. at pp. 8-9. The cases cited by NHTA where rural ILEC participation was permitted involved broad policy issues and not development of a detailed factual case on the asserted adverse financial rate of return impacts of lawful telecommunications competition.

[21] MetroCast Supp. Brief at pp. 8-10; Commission Supp. Brief at 7; see also Section I supra.

Conclusion

For the reasons discussed herein and in the Initial and Supplemental Briefs, Union lacks a constitutional or statutory right to an adjudicative hearing on requests by MetroCast and IDT to enter Union's territory and provide competitive communications services in Union's seven town service area. The Court should also respect the Commission's expert concerns that an adjudicative hearing requirement would constitute an impermissible entry barrier in violation of 47 U.S.C. § 253. Accordingly, the Court should dismiss the Union appeals and affirm the MetroCast and IDT certifications.

Respectfully submitted,

METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

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