



THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case Nos. 2009-0168 & 2009-0432, Appeal of Union Telephone Company d/b/a Union Communications, the court on March 3, 2010, issued the following order:

In these consolidated appeals, Union Telephone Company d/b/a Union Communications (Union) appeals orders of the New Hampshire Public Utilities Commission (PUC), which denied Union's motion to rescind the PUC's grant of authority to the petitioners, MetroCast Cablevision of New Hampshire, LLC (MetroCast) and IDT America, Corp. (IDT), to operate as competitive local exchange carriers (CLECs) in Union's service territory. Union contends, in part, that it had a constitutional due process right to notice and an opportunity to be heard before the PUC granted authority to MetroCast and IDT to operate as CLECs in Union's service territory. Union has grounded its constitutional argument upon RSA 374:22-g (2009), which requires the PUC to determine whether it is consistent with the public good to authorize more than one provider to provide telecommunications services in any service territory, and which mandates the PUC to consider "the incumbent utility's opportunity to realize a reasonable return on its investment" when determining the public good. RSA 374:22-g, II.

In briefing this issue, the parties have focused upon whether Union has a constitutionally protected property interest at stake. The parties, however, have not addressed the other parts of the test used to determine whether particular procedures satisfy the requirements of due process. When making such a determination, we balance three factors: (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. In the Matter of Stapleford & Stapleford, 156 N.H. 260, 264 (2007); see Mathews v. Eldridge, 424 U.S. 319, 335 (1976). While the parties have briefed the first prong of this test, they have not briefed the second and third prongs. Therefore, on or before April 5, 2010, the parties shall file brief memoranda, not to exceed fifteen (15) pages, addressing the following question and any subsidiary question fairly comprised therein:

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?

Within seven (7) days of receiving the opposing party's memorandum, the parties may request leave to file reply memoranda.

Broderick, C.J., and Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

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