

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 10-183

Petition by Certain Rural Telephone Companies
Regarding CLEC Registrations within Their Exchanges

DIRECT TESTIMONY OF
DOUGLAS MEREDITH
ON BEHALF OF

Granite State Telephone, Inc.,
Dunbarton Telephone Company, Inc.,
Bretton Woods Telephone Company, Inc., and
Dixville Telephone Company

October 22, 2010

1 **I. Introduction**

2 **Q: PLEASE STATE YOUR FULL NAME, PLACE OF EMPLOYMENT AND**
3 **POSITION.**

4 A: My full name is Douglas Duncan Meredith. I am employed by John Staurulakis, Inc.
5 ("JSI") as Director – Economics and Policy. JSI is a telecommunications consulting firm
6 headquartered in Greenbelt, Maryland. My office is located at 547 Oakview Lane,
7 Bountiful, Utah 84010. JSI has provided telecommunications consulting services to rural
8 local exchange carriers since 1963.

9
10 **Q: PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND**
11 **EDUCATIONAL BACKGROUND.**

12 A: As the Director of Economics and Policy at JSI, I assist clients with the development of
13 policy pertaining to economics, pricing and regulatory affairs. I have been employed by
14 JSI since 1995. Prior to my work at JSI, I was an independent research economist in the
15 District of Columbia and a graduate student at the University of Maryland – College
16 Park.

17
18 In my employment at JSI, I have participated in numerous proceedings for rural and non-
19 rural telephone companies. These activities include, but are not limited to, the creation of
20 forward-looking economic cost studies, the development of policy related to the
21 application of federal safeguards for rural local exchange carriers, the determination of
22 Eligible Telecommunications Carriers pursuant to the Communications Act of 1934, as
23 amended ("Act"), and the sustainability and application of universal service policy for
24 telecommunications carriers.

1 In addition to assisting telecommunications carrier clients, I have served as the economic
2 advisor for the Telecommunications Regulatory Board of Puerto Rico since 1997. In this
3 capacity, I provide economic and policy advice to the Board Commissioners on all
4 telecommunications issues that have either a financial or economic impact. I have
5 participated in numerous Arbitration panels established by the Board to arbitrate
6 interconnection issues under Section 252(b) of the Telecommunications Act of 1996 (the
7 “Act”).

8
9 I am participating or have participated in numerous national incumbent local exchange
10 carrier and telecommunications groups, including those headed by NTCA, OPASTCO,
11 USTA, and the Rural Policy Research Institute. My participation in these groups focuses
12 on the development of policy recommendations for advancing universal service and
13 telecommunications capabilities in rural communities and other policy matters.

14
15 I have testified or filed pre-filed regulatory testimony in various states including Maine,
16 Indiana, New Hampshire, Vermont, New York, Michigan, Wisconsin, North Dakota,
17 South Dakota, South Carolina, Texas, Kentucky, Utah, Florida, Washington, Georgia and
18 Tennessee. I have also participated in regulatory proceedings in many other states that did
19 not require formal testimony, including Louisiana, Mississippi, North Carolina, Puerto
20 Rico and Virginia. In addition to participation in state regulatory proceedings, I have
21 participated in federal regulatory proceedings through filing of formal comments in
22 various proceedings and submission of economic reports in an enforcement proceeding.

23
24 I have a Bachelor of Arts degree in economics from the University of Utah, and a
25 Master’s degree in economics from the University of Maryland – College Park. While

1 attending the University of Maryland – College Park, I was also a Ph.D. candidate in
2 Economics. This means that I completed all coursework, comprehensive and field
3 examinations for a Doctorate of Economics without completing my dissertation.
4

5 **Q: ON WHOSE BEHALF ARE YOU TESTIFYING?**

6 A: I am testifying on behalf of the Granite State Telephone, Inc., Dunbarton Telephone
7 Company, Inc., Bretton Woods Telephone Company, Inc. and Dixville Telephone
8 Company (collectively referenced as “RLECs”).
9

10 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

11 A: My purpose in this testimony to the New Hampshire Public Utilities Commission
12 (“Commission”) is to provide my expert opinion regarding the policies invoked by the
13 New Hampshire state statutory requirements applicable to CLECs seeking to offer
14 services in the RLEC service territories. My review compares the New Hampshire
15 requirements with those of other states. I conclude that the policies invoked by the New
16 Hampshire statute would not likely be pre-empted by federal statute inasmuch as the
17 policies sought by each statute are congruent.

18 **II. Commission Practice for Certain CLEC Certifications**

19 **Q: HAVE YOU REVIEWED THE PROCESS USED BY THE COMMISSION TO**
20 **CERTIFY CLECS STATEWIDE?**

21 A: Yes, to prepare for my testimony, I looked generally at the process the Commission has
22 used to grant certifications or registrations to CLECs in New Hampshire.
23

1 **Q: PLEASE IDENTIFY THE PROCESS USED BY THE COMMISSION TO**
2 **CERTIFY CLECS STATEWIDE.**

3 A: In September 2008, RSA 374:22-f was repealed. This statute prohibited entry by CLECs
4 into territories of telephone utilities with fewer than 25,000 access lines (including the
5 RLECs in this proceeding). This repeal triggered a change in the process used by the
6 Commission to grant certifications to CLECs. Since this time, the Commission has relied
7 on a form entitled CLEC-10 Form registration; this registration is based on Commission
8 Rule Puc 431.01.

9
10 According to the record in this proceeding, Commission staff has concluded that a total
11 of 19 CLEC-10 Forms have been processed since September 2008.¹ Thirteen CLECs
12 requested registration for only FairPoint Exchanges. These thirteen CLECs correctly
13 applied Puc 431.01 in defining the scope of their requests to be limited to FairPoint
14 exchanges. Five CLECs requested and were granted registration statewide. These five
15 CLEC registrations are at the root of the present controversy.

16
17 Despite the explicit language in Commission rule Puc 431.01 stating that the rule only
18 applies in the territories of non-exempt ILECs, the statewide CLEC registration under
19 CLEC-10 Form for these five CLECs appears to ride roughshod over the Commission
20 rule and the New Hampshire statute RSA 374:22-g.

21
22 **Q: PLEASE IDENTIFY SPECIFICALLY THE RULE PUC 431 YOU REFERENCE**
23 **IN YOUR DESCRIPTION OF THE PRESENT COMMISSION PRACTICE.**

¹ DT 10-183, Staff Memo Recommendation (Jul. 28, 2010).

1 A: Chapter Puc 400 lists Commission rules for telecommunications. Puc 431 is titled as
2 CLEC REGULATORY REQUIREMENTS and Puc 431.01 is titled as Registration. Puc
3 431.01(d) explicitly states that the CLEC registration would authorize CLEC activity in
4 the territory of non-exempt ILECs. Specially, this subpart states:

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

9 A non-exempt ILEC is defined in Puc 402.33 as “an ILEC that is not exempt pursuant to
10 47 U.S.C. §251(f).” This section of the Communications Act of 1934, as amended is
11 generally referenced as the federal rural exemption provision. The RLECs in this
12 proceeding continue to be exempt under this section of the federal code. Therefore, the
13 CLEC-10 Form registration is not appropriate for the areas served by the RLECs.

14 **III. Stipulation by the Parties in this Proceeding**

15 **Q: ARE YOU AWARE OF AND HAVE YOU REVIEWED A STIPULATION**
16 **ENTERED INTO IN THIS PROCEEDING?**

17 A: Yes, a stipulation of facts was filed with the Commission on October 5, 2010
18 (“Stipulation”).

19
20 **Q: PLEASE DESCRIBE THE CLEC REGISTRATION PROCEDURES AGREED**
21 **TO BY THE SIGNATORIES OF THE STIPULATION.**

22 A: The stipulated CLEC registration procedures are conditional on whether the state statute
23 is pre-empted by federal law. Assuming that the state statute is not pre-empted, the
24 stipulation requires the following:

- 1 • CLEC will request entry via petition, application or other form of request.
- 2 • Public Notice will be published and served on the affected RLEC(s).
- 3 • The affected RLEC(s) will be a mandatory party to the proceeding.
- 4 • Commission will hold a pre-hearing conference and technical session.
- 5 • RLEC(s) and others will have an opportunity to file testimony.
- 6 • Parties will have an opportunity to propound discovery.
- 7 • Parties will have an opportunity for a public evidentiary hearing.
- 8 • Parties will have an opportunity to file briefs and/or requests for findings
9 of fact or law.
- 10 • Commission will issue an Order.
- 11 • Parties can petition for reconsideration or appeal.

12 Absent from these procedures is the standard that the state statute requires the
13 Commission to use in issuance of an Order. RSA 374:22-g provides guidance for a
14 Commission determination stating the Commission must determine “that it is consistent
15 with the public good unless prohibited by federal law” to grant a CLEC authority to
16 operate in rural ILEC areas of the state. More specifically the statute provides guides to
17 determine the public good. The commission is required to consider:

- 18 • the interests of competition with other factors including, but not limited to,
- 19 • fairness;
- 20 • economic efficiency;
- 21 • universal service;
- 22 • carrier of last resort obligations;
- 23 • the incumbent utility’s opportunity to realize a reasonable return on its
24 investment; and

- 1 • the recovery from competitive providers of expenses incurred by the incumbent
2 utility to benefit competitive providers, taking into account the proportionate
3 benefit or savings, if any, derived by the incumbent as a result of incurring such
4 expenses.

5 Lastly, in what is beyond the scope of this proceeding, is the directive the statute gives
6 the Commission. The Commission is required to “adopt rules, pursuant to RSA 541-A,
7 relative to the enforcement of this section.” This suggests that the Commission should
8 engage in a rulemaking and adopt rules establishing the standard by which it shall judge a
9 request as well as the procedures, similar to what has been stipulated in this proceeding
10 by the parties, the Commission shall use in addressing a CLEC request.

11 **IV. Review of CLEC Requirements in Other States**

12 **Q: HAVE YOU EXAMINED THE CERTIFICATION REQUIREMENTS OF OTHER**
13 **STATES IN PREPARING YOUR TESTIMONY?**

14 **A:** Yes. In preparing my testimony I have examined the CLEC application procedures and
15 laws in other states. While I would have liked to perform a complete census of CLEC
16 requirements for all states, the expense in doing so was too high. Therefore, I instructed
17 my staff to obtain copies of state requirements in the New England, the Mid-Atlantic and
18 down the Atlantic coast as well as some other larger states in the Mid-West, Southwest
19 and West. In all, I have gathered CLEC requirements in 26 states. See Exhibit DDM-01,
20 which contains statutes, rules and/or commission orders related to CLEC authority to
21 provide service, as well as instructions or sample applications and approval orders for
22 many states. Overall, this exhibit demonstrates that procedures comparable to those in
23 the Stipulation are commonplace among the states.

1 **Q: PLEASE IDENTIFY THE STATES YOU REVIEWED.**

2 A: The states listed in alphabetical order are as follows: Alabama, Arizona, California,
3 Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine,
4 Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania,
5 Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia.

6
7 **Q: IN SELECTING THESE STATES, DID YOU SELECT STATES FAVORING**
8 **THE POSITION OF THE RLECs IN THIS PROCEEDING?**

9 A: No. I selected the states using a geographic approach focusing on the eastern seaboard
10 and Gulf States as the base and then capturing larger states in the mid-West, Southwest
11 and West. The only exception to this approach was the inclusion of Tennessee. I
12 included Tennessee because the CLEC application and rules were available from another
13 project and not because it fit the geographic profile I adopted prior to gathering data.

14
15 **Q: PLEASE DESCRIBE GENERALLY YOUR FINDINGS OF CLEC**
16 **APPLICATIONS AND REQUIREMENTS IN OTHER STATES.**

17 A: Generally all of the states require the CLEC applicant to demonstrate managerial,
18 technical and financial capability to operate. States also generally require a description of
19 services to be provided, including tariffs or price lists. Often, the CLEC must
20 demonstrate adherence to customer service rules in each state.

21
22 Virtually all of the states assign the application to a docket and provide some sort of
23 public notice of the application. Some states require hearings as well, which range in
24 scope from simple consent agenda items, to telephonic hearings, to formal hearings with
25 appearances by company witnesses (*e.g.* Alabama, Arizona, Illinois). Finally, it should

1 be noted that the application process, even when unopposed, is often measured in months
2 and in certain states, like Arizona, may approach a year.

3
4 **Q: PLEASE IDENTIFY UNIQUE PROVISIONS IN OTHER STATES AND**
5 **COMPARE THESE TO THE PROVISIONS IDENTIFIED IN RSA 374:22-g AND**
6 **THE STIPULATION IN THIS PROCEEDING.**

7 A: First, I note there are unique provisions in many states. For example, the filing of a
8 surety bond (*e.g.*, ME, CT, DE), the requirement to file a detailed business plan (*e.g.*, NJ
9 and AZ), and the development of a disaster recovery plan (*e.g.*, VT) are unique
10 provisions in some state application processes.

11
12 More noteworthy are provisions comparable to the provisions found in either New
13 Hampshire statute RSA 374:22-g or the Stipulation. I found provisions in eight (8) states
14 that I wish to highlight.

- 15 1. Connecticut – There is a requirement for the CLEC to address specific state goals,
16 including universal service, in its statement supporting the public good.
- 17 2. Vermont – In addition to determining the overall fitness of the CLEC, the state
18 must find the service provides a general good.
- 19 3. Alabama – The Commission has a specific provision for non RBOC territory.
20 There is a reservation to limit a CLEC application for non RBOC territory until
21 the Commission can determine the impact of the CLEC’s entry on the incumbent
22 local exchange carrier.
- 23 4. Georgia – The Commission requires the CLEC to obtain an interconnection
24 agreement with rural carriers prior to offering service. The Commission explicitly
25 recognizes that rural carriers are exempt from Section 251(c) of the

1 Communications Act under Section 251(f). No CLEC may offer service in rural
2 areas until the Commission has approved an interconnection agreement.

3 5. Kentucky – The Commission recognizes carrier of last resort (COLR) obligations
4 in granting a certificate of operation.

5 6. North Carolina – The CLEC must serve its application on all affected LECs in
6 North Carolina.

7 7. Ohio – The Commission requires that the CLEC affirm that at a minimum,
8 interconnection negotiations have begun with the incumbent carriers.

9 8. South Carolina – The Commission recognizes a rural stipulation that excludes
10 rural areas from consideration when a CLEC seeks a statewide application. The
11 public interest finding for rural areas is delayed and the rural carriers have an
12 opportunity to file a petition or motion concerning the impact competitive entry
13 may have in rural areas of the state.

14
15 These examples show considerable variation to the general fitness determination
16 employed generally by many states and confirm that the stipulated provisions in this
17 proceeding as well as the standard for review under the state law fall within the ambit of
18 reasonable policy directives assessed by other state commissions.

19
20 Specifically, there are parallels from other states to the New Hampshire directives
21 looking into fairness, universal service, carrier of last resort obligations, and the ability of
22 the incumbent to operate under a specific regulatory regime. Furthermore, there are
23 states that have similar provisions to those stipulated to in this proceeding.

24

1 The New Hampshire statutory directive to examine the recovery of expenses incurred by
2 incumbent utilities to the benefit of CLECs is unique to New Hampshire. I found no
3 parallel directive in the states I reviewed, although it is consistent with considerations
4 related to universal service and carrier of last resort obligations.

5
6 **Q. ARE APPLICANTS REQUIRED TO PRESENT THEIR CASE IN CHIEF IN
7 THEIR INITIAL APPLICATIONS?**

8 A. They are certainly required to fully state their case in their initial applications. Indeed, in
9 some states, the initial application, with attached financial reports, tariffs, plans, and
10 supplemental pleadings can be over a hundred pages. Furthermore, it is my observation
11 that the burden of proof lies with the applicant CLEC, which is consistent with this
12 Commission's Rule Puc 203.25, which provides that the "party seeking relief through a
13 petition, application, motion or complaint shall bear the burden of proving the truth of
14 any factual proposition by a preponderance of the evidence."

15
16 **Q. DO YOU BELIEVE IT WOULD BE GOOD PUBLIC POLICY THAT THIS
17 BURDEN APPLIES TO THE FACTORS DESCRIBED IN RSA 374:22-g?**

18 A. Yes, although it is would be reasonable to assume that the burden of producing evidence
19 related to rate of return, carrier of last resort issues, and expense recovery rests with the
20 RLECs, who would be expected to cooperate in developing the necessary record.

21 **V. State Review and Federal Preemption**

22 **Q: IN ITS AUGUST 5, 2010 ORDER OF NOTICE, THE COMMISSION
23 IDENTIFIED FEDERAL PREEMPTION OF THE STATE DEFINED PROCESS
24 AS AN ISSUE TO EXAMINE IN THIS PROCEEDING. WHAT IS THE**

1 **FEDERAL PREEMPTION PROVISION MOST LIKELY REFERENCED BY**
2 **THE COMMISSION?**

3 A: While the Commission Order does not reference a particular federal preemption statute, it
4 is most likely that Section 253 of the Communications Act of 1934, as amended was the
5 statute implied by the Commission.

6
7 **Q: PLEASE DESCRIBE SECTION 253 OF THE ACT.**

8 A: Section 253 states:

9 Section 253 [47 USC Section 253]. Removal of Barriers to Entry

10 (a) In General.--No State or local statute or regulation, or other
11 State or local legal requirement, may prohibit or have the effect of
12 prohibiting the ability of any entity to provide any interstate or intrastate
13 telecommunications service.

14 (b) State Regulatory Authority.--Nothing in this section shall
15 affect the ability of a State to impose, on a competitively neutral basis and
16 consistent with Section 254, requirements necessary to preserve and
17 advance universal service, protect the public safety and welfare, ensure the
18 continued quality of telecommunications services, and safeguard the rights
19 of consumers.

20 (c) State and Local Government Authority.--Nothing in this
21 section affects the authority of a State or local government to manage the
22 public rights-of-way or to require fair and reasonable compensation from
23 telecommunications providers, on a competitively neutral and
24 nondiscriminatory basis, for use of public rights-of-way on a
25 nondiscriminatory basis, if the compensation required is publicly disclosed
26 by such government.

27 (d) Preemption.--If, after notice and an opportunity for public
28 comment, the Commission determines that a State or local government has
29 permitted or imposed any statute, regulation, or legal requirement that
30 violates subsection (a) or (b), the Commission shall preempt the
31 enforcement of such statute, regulation, or legal requirement to the extent
32 necessary to correct such violation or inconsistency.

1 (e) Commercial mobile service providers.--Nothing in this section
2 shall affect the application of Section 332(c)(3) to commercial mobile
3 service providers.

4 (f) Rural Markets.--It shall not be a violation of this section for a
5 State to require a telecommunications carrier that seeks to provide
6 telephone exchange service or exchange access in a service area served by
7 a rural telephone company to meet the requirements in Section 214(e)(1)
8 for designation as an eligible telecommunications carrier for that area
9 before being permitted to provide such service. This subsection shall not
10 apply--

11 (1) to a service area served by a rural telephone company
12 that has obtained an exemption, suspension, or modification of Section
13 251(c)(4) that effectively prevents a competitor from meeting the
14 requirements of Section 214(e)(1); and

15 (2) to a provider of commercial mobile services.

16 The federal preemption provision in this Section is found in subpart (d) referenced above.

17
18 **Q: DOES THE NEW HAMPSHIRE PROVISION TO ADDRESS SPECIFIC**
19 **POTENTIAL EFFECTS OF A CLEC APPLICATION IN A RURAL CARRIER**
20 **AREA CREATE AN AUTOMATIC CASE FOR PREEMPTION?**

21 A: No. From a policy perspective, I do not believe the New Hampshire statute raises a
22 federal preemption case, *per se*, and as long as the Commission's rules effecting this
23 statute are consistent with its underlying policy, I cannot see how the investigation
24 contemplated by the statute creates a case for FCC preemption.

25
26 **Q: IS IT CORRECT THAT FROM A POLICY STANDPOINT, IT IS IMPORTANT**
27 **FOR THE COMMISSION TO ADDRESS FAITHFULLY THE STATE STATUTE**
28 **AND INVESTIGATE THE IMPACT OF COMPETITION IN RURAL CARRIER**
29 **AREAS OF THE STATE?**

1 A: Yes. It goes without saying that the Commission needs to initiate a rulemaking and
2 promulgate rules that are faithful to the state statute. The New Hampshire statute
3 recognizes it is in the public good to undertake a serious investigation of a CLEC
4 application in areas served by rural carriers. It also recognizes that there are some policy
5 contours that may intersect with a federal preemption. Hence, the statute states the
6 Commission should examine CLEC entry to the extent it is not preempted.

7
8 **Q: ASSUMING THE STATE COMMISSION UNDERTAKES AN INVESTIGATION**
9 **OF A CLEC APPLICATION IN AN AREA SERVED BY A RURAL CARRIER**
10 **THAT IS FAITHFUL TO THE STATE STATUTE, WHAT POLICY**
11 **IMPLICATIONS CAN RESULT FROM THIS INVESTIGATION?**

12 A: First, Section 253(a) indicates that state requirements prohibiting the provision of any
13 interstate or intrastate telecommunications service are not allowed. This subpart does not
14 prevent a state from imposing reasonable conditions on the provision of
15 telecommunications service. The imposition of conditions is consistent with subpart (b),
16 which can be viewed as a state savings provision for policy requirements addressing
17 universal service, public safety and welfare, and ensuring the continued quality of
18 telecommunications service in the state; and, subpart (f) which allows the state to impose
19 strict eligible telecommunications carrier (ETC) requirements on a CLEC entering an
20 area served by a rural carrier.

21
22 Examined together, these provisions in Section 253 suggest it is a very good policy for
23 the Commission to examine the effects of a CLEC application and address these effects.
24 Section 253 even provides authority for a state commission to address these effects by
25 imposing ETC status on an entrant for areas served by rural carriers. The authorization to

1 apply Section 214(e) duties on a carrier is a strong response to a CLEC application and
2 may be warranted, even though it may be burdensome to the CLEC. I note that there are
3 many CLECs and not many of these are designated as ETCs nationally.

4
5 Notwithstanding the ETC designation, other requirements imposed on entry can be
6 crafted to balance the interests of the state and allow reasonable entry of CLECs in areas
7 served by rural carriers.

8
9 **Q: SECTION 253(B) ADDRESSES STATE REGULATORY AUTHORITY. IT**
10 **IDENTIFIES REQUIREMENTS THAT ARE “COMPETITIVELY NEUTRAL.”**
11 **WHAT DOES THIS TERM SIGNIFY FROM A POLICY STANDPOINT?**

12 A: The term “competitively neutral” is used in only three sections of the Act. Nowhere is
13 the phrase defined. A general sense of this phrase is that requirements be applied
14 uniformly and not be directed at one carrier or a class of carriers. For example, the FCC
15 rejected Wyoming’s use of this term to apply only to new entrants and not to incumbent
16 carriers.² On the other hand, the FCC has also emphasized that the requirements of
17 competitive neutrality cut both ways. In the *Hyperion Order*, it clarified that “a state
18 legal requirement would not as a general matter be ‘competitively neutral’ if it favors
19 incumbent LECs over new entrants (*or vice-versa*).”³ From this I conclude that, just as
20 the Section 253 acts against any state requirement that unduly favors the ILEC, it would
21 also act against any requirement (or lack thereof) that favors the CLEC at the expense of
22 the ILEC. An example of this kind of reversal, which I allude to later in my testimony, is

² Silver Star Telephone Co., Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (“*Silver Star Order*”).

³ Hyperion of Tennessee, L.P. Petition for Preemption, Memorandum Opinion and Order, 14 FCC Rcd 11064 ¶ 16 (1999) (emphasis supplied) (“*Hyperion Order*”).

1 the situation in which a new entrant is permitted to selectively market into a particular
2 territory while at the same time the RLEC is bound by rate-averaged carrier of last resort
3 obligations.

4
5 **Q. ARE YOU AWARE OF CIRCUMSTANCES IN WHICH THE FCC HAS**
6 **PREEMPTED STATE ENTRY REQUIREMENTS SIMILAR TO THOSE IN THE**
7 **STIPULATION?**

8 A. No. While the FCC has exercised its preemption authority under Section 253(b), it has
9 been in the face of state requirements that were either an express ban on CLEC entry, or
10 vested veto power in the hands of the ILEC. For example, in the *Silver Star Order*, the
11 FCC preempted a provision of the Wyoming Telecommunications Act of 1995 that
12 allowed incumbent LECs serving 30,000 or fewer access lines to preclude anyone from
13 providing competing local exchange service in their territories until at least January 1,
14 2005.⁴ Similarly, in the *Texas Preemption Order* the Commission preempted a section of
15 the Texas Public Utility Act of 1995 that prohibited certain competitive LECs from
16 offering service in exchange areas of incumbent LECs serving fewer than 31,000 access
17 lines.⁵ Finally, in the *Hyperion Order*, the FCC preempted a Tennessee statute that
18 protected ILECs serving fewer than 100,000 access lines from competition until the LEC
19 either “voluntarily” entered into an interconnection agreement with a CLEC or the ILEC
20 applied for authority to provide telecommunications services in an area outside its service
21 area.⁶

22

⁴ *Silver Star Order* ¶¶ 38-39.

⁵ In re Public Utility Commission of Texas, Petitions for Declaratory Ruling and/or Preemption, 13 FCC Rcd. 3460 ¶¶ 106 -107 (1997).

⁶ *Hyperion Order* ¶ 12.

1 Unlike RSA 374:22-g, all of the statutes involving these key cases served as outright
2 prohibitions against CLEC entry, and involved no consideration or findings of how this
3 served the public good in the situation involving the particular parties. I am not aware of
4 any state CLEC entry procedures similar to those in the Stipulation that have been
5 preempted.

6
7 **Q: IF THE COMMISSION WERE TO INVESTIGATE A CLEC APPLICATION**
8 **WHAT CONSIDERATIONS SHOULD THE COMMISSION REVIEW?**

9 A: Obviously, the items suggested by Section 253(b) of the Act come to mind, that is, issues
10 related to universal service, public safety and welfare, the continued quality of
11 telecommunications services, and the rights of consumers. Not surprisingly, these issues
12 are congruent with the factors to be considered under RSA 374:22-g.

13
14 It is well known in the industry, and it is also my experience, that the predominant CLEC
15 business model focuses on services to low cost, high volume services such as business
16 service, high capacity private lines, and middle mile transport and backhaul. Thus, a key
17 factor to be considered is the issue of high cost versus low cost subscribers and the effect
18 of mandatory rate averaging, which directly affects the ILEC's rate of return and its
19 ability to sustain its obligations as the carrier of last resort (a state term that is closely
20 related to ETC designation federally).

21
22 **Q: IS THE COMMISSION PREVENTED FROM INVESTIGATING THESE**
23 **MATTERS UNDER SECTION 253 OF THE ACT?**

24 A: Absolutely not. Section 253(b) reserves the ability of a state commission to review
25 policy issues and impose requirements on carriers. Moreover, Section 253(f)

1 contemplates requiring ETC designation on entrants to areas served by rural carriers.
2 Section 253(f) provides for ETC designation as a requirement for entrants that in some
3 instances would be a significant hurdle to dissuade entry and may have the effect of
4 prohibiting entry into the rural market. The ETC designation and its attendant
5 requirements is a policy option available to the Commission for areas served by rural
6 carriers. The Commission would have to assess whether this requirement is necessary and
7 a review of the entire panoply of issues identified in the state statute would be appropriate
8 from a policy perspective. Both of these determinations would appear to require
9 discovery, technical conferences, and hearings.

10

11 **Q: DOES THIS CONCLUDE YOUR DIRECT PRE-FILED TESTIMONY?**

12 **A: Yes.**