

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

RE METROCAST CABLEVISION OF NEW HAMPSHIRE APPLICATION FOR CERTIFICATION AMENDMENT	) ) ) ) )	UNDOCKETED
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**OPPOSITION OF METROCAST CABLEVISION TO  
UNION TELEPHONE COMPANY MOTION TO RESCIND CERTIFICATION**

**INTRODUCTION**

MetroCast Cablevision of New Hampshire, LLC (“MetroCast”) opposes the October 10, 2008 “Motion of Union Telephone Company to Rescind Authority Issuance, for Procedures Consistent with Law, and for Rehearing” (hereinafter “Union Motion”). Pursuant to the newly-amended statute, RSA 374:22-g, in combination with the repeal of RSA 374:22-f (both effective September 5, 2008), the Telecommunications Division (“Division”) of the Public Utilities Commission (“Commission” or “PUC”) approved the amendment of MetroCast’s existing competitive local exchange carrier (“CLEC”) certification to include the MetroCast communities in which Union Telephone Company (“Union”) serves as the incumbent local exchange carrier (“ILEC”). The Commission should deny the Union Motion for two principal reasons.

First, as amended only last month, Section 374:22-g now requires that the territory of rural ILECs, such as Union, be considered “non-exclusive.” Furthermore, the legislature also eliminated the Section 374:22-f state rural exemption from CLEC competition. Given these twin pro-competitive commands from the legislature, Union

lacks a cognizable legal interest in MetroCast's request to expand its Certification.<sup>1</sup>

While MetroCast's entry may well affect Union's ability to meet universal service or carrier of last resort obligations (Union Motion, p. 4), the amendments to RSA 274:22-f and 22-g reflect a legislative finding that CLEC entry into rural areas is in the public interest. Union, of course, retains rights to petition the Commission for a determination of Union's federal rural exemption pursuant to 47 U.S.C. § 251(f) in the event MetroCast seeks ILEC interconnection under 47 U.S.C. § 251(c) (which MetroCast does not plan to do) or for any appropriate relief relative to Union's own ILEC obligations caused by MetroCast's entry.

Second, Union's other claims of statutory violations in connection with the amended CLEC certification to MetroCast are lacking in case law support and in the text of applicable statutes, and should be summarily rejected. Among other things, (1) the Commission is not statutorily compelled to perform a complete notice and comment proceeding for every CLEC application; (2) it is not required to treat CLEC applications as a dispute over LEC boundaries; (3) the Commission need not be limited by the outdated and statutorily preempted prohibition on CLEC applications in rural ILEC territories contained in PUC 431; and (4) it is not required to notify municipalities under a statute applicable to Commission proceedings that directly affect municipal rights.

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<sup>1</sup> See RSA 374:26 (permitting a certification ruling to be issued without a public hearing unless opposed by "interested parties").

## ARGUMENT

### I. UNION LACKS PARTY STANDING TO OPPOSE METROCAST'S EXPANDED CLEC CERTIFICATION.

Pursuant to the practice in place since the enactment of the PUC 400 rules in 2005,<sup>2</sup> the Division reviews and, where appropriate, approves CLEC applications on the Commission's behalf without the necessity of public notice or hearings.<sup>3</sup> The Division followed this non-adjudicatory process in reviewing and issuing MetroCast's initial May 17, 2007 CLEC Certification in the Verizon territories, and, following the statutory changes effective on September 5, 2008, in issuing to MetroCast the expanded Certification on September 30, 2008.

Union has requested that the Commission rescind or rehear the Certification. Based on the Revised Statutes as amended last month, Union now lacks "party" standing under RSA 374:26 and 541-A:1 and fails to prove that MetroCast's CLEC application process qualifies as a "contested case" under RSA 541-A:1. Accordingly, Union is not entitled to statutory notice and hearing that would justify suspension or rescission of MetroCast's expanded certification. The Union Motion should therefore be denied.

Under RSA 541-A: 1, a "party" is a person named by the agency as a party or, alternatively, a person "entitled as a right to be admitted as a party." *Id.* (emphasis

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<sup>2</sup> See generally, "Starting a CLEC in New Hampshire: Frequently Asked Questions" <available at <http://www.puc.state.nh.us/Telecom/CLECfaq.pdf>> (discussing application process under PUC 400 rules and noting that the registration process ordinarily takes about four weeks).

<sup>3</sup> See RSA 374:22 (requiring Commission certification before entry into a new territory); RSA 374:26 (permitting Commission action without a hearing, absent opposition from "interested parties"); see also recently amended RSA 374:22-g (removing restrictions on telecommunications certifications in "Certain" (formerly rural) "Service Territories" and now expressly empowering the Commission to authorize certification upon petition or on its own motion in "any service territory," in tandem with Section 374:22-f which repeals the former state law prohibition on CLEC entry into territories of rural ILECs).

added). Similarly, under the same statute, a “contested case” is a proceeding in which a party’s “legal rights” are “required by law” to be determined after notice and hearing.” Id. Prior to the September 5, 2008 statutory revisions, rural ILECs such as Union plainly had legal rights conferred by the RSA 374:22-f and 22-g exclusivity provisions to obtain a public hearing on any CLEC entry request. Now that these provisions have been repealed and revised, respectively, to remove the rural ILEC exclusion and make clear that telecommunications certifications could be issued in “any service area,” Union stands in the same procedural posture as a non-rural ILEC (i.e., FairPoint) for purposes of CLEC applications. It cannot merely claim party status or attempt to establish a contested case based on the fact that MetroCast is entering their service territory and likely will take its customers (with associated impacts on universal service and carrier of last resort obligations),<sup>4</sup> as the legislature has made it plain that CLEC entry comports with the public interest.

Union also relies on the August 18, 2008 Order in the Comcast docket (“August 18<sup>th</sup> Comcast Order”) to support its claim that it is entitled to a hearing.<sup>5</sup> In the Comcast docket, the Commission acknowledged that “current CLEC registration rules provide an appropriate balance between the interests of incumbent telecommunications providers and those of competitive entrants...” and that the “enactment of changes to RSA 374:22-g makes it clear the legislature intends to allow competition in all areas of the state.”<sup>6</sup> While the Commission granted the rural ILECs a hearing in the Comcast docket and

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<sup>4</sup> See Union Motion, p. 4.

<sup>5</sup> Id., p. 5 (citing Comcast Phone of New Hampshire LLC, DT 08-013 (August 18, 2008), Order Granting Hearing).

<sup>6</sup> Comcast Phone of New Hampshire LLC, DT 08-013 (August 18, 2008), Order Granting Hearing, pp. 10-11.

classified them as interested parties under RSA 374:26, the August 18<sup>th</sup> Comcast Order was issued before the effective dates for the repeal of RSA 374:22-f and the revision to RSA 374:22-g. Union no longer possesses a similar legal right in the MetroCast CLEC application process to justify party status and a public hearing.<sup>7</sup>

Rejection of Union's arguments in MetroCast's certification proceeding does not deprive Union of opportunities to raise issues associated with MetroCast's entry in other forums. While MetroCast does not plan to request ILEC interconnection with Union pursuant to 47 U.S.C. § 251(c) that would trigger a Commission proceeding to determine whether to waive the federal rural exemption pursuant to 47 U.S.C. § 251(f),<sup>8</sup> Union could invoke those rights if MetroCast changes plans and requests § 251(c) ILEC interconnection.<sup>9</sup> Moreover, Union would retain the ability to petition the Commission for appropriate relief to the form of its ILEC regulation to address competitive impacts associated with the MetroCast entry.

Conversely, acceptance of Union's arguments that a rural ILEC necessarily is entitled to interested party status that triggers a full adjudicatory proceeding in every CLEC application will frustrate the public interest. Requiring a time consuming and costly contested case on every CLEC application to serve rural exchanges that might only

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<sup>7</sup> The Comcast docket also has several unique attributes that may further distinguish it from the instant proceeding, including (1) Comcast's role in providing qualified support for the rural ILEC's alternative regulation plan in a separate docket (DT 07-027) that was rescinded when the Commission did not approve the plan in pertinent part, (2) claims that Comcast was not providing telecommunications services required of New Hampshire CLECs, and (3) concerns that Comcast was offering a form of Voice-Over Internet Protocol service not subject to state jurisdiction. See generally August 18<sup>th</sup> Order. In contrast, MetroCast has previously stipulated to Commission jurisdiction for its voice service in Docket DT 06-169 and there is no pending Union alternative regulation plan docket.

<sup>8</sup> MetroCast has a pending request with Union for interconnection to exchange traffic pursuant to 47 U.S.C. §§ 251(a) and (b) exclusively.

<sup>9</sup> Compare Union Motion, p. 2 (claiming that Union is a rural LEC that has not yet waived its federal exemption pursuant to 47 U.S.C. § 251(f)).

serve a few thousand lines likely will damage the prospects for telecommunications competition in large portions of New Hampshire.

For all of these reasons, Union's claim of entitlement to party status sufficient to trigger a full adjudicatory proceeding is legally unsupported and unwise as a policy matter, and should be rejected.

## **II. UNION'S REMAINING PROCEDURAL CLAIMS LACK A VALID LEGAL BASIS.**

In addition to its core claim of right to notice and hearing as an interested party under RSA 374:26 and related statutes, the Union Motion asserts that the grant of the amended Certification to MetroCast violates a host of additional statutes. These scattershot claims lack any merit and should be summarily rejected.

### **A. The Commission Was Not Required to Initiate Formal Adjudicative Proceedings in MetroCast's CLEC Authorization Application Process.**

Union attacks the Division's entire procedure in processing MetroCast's CLEC application, asserting that it failed to offer an adjudicative proceeding allowing for the submission and formal examination of evidence<sup>10</sup> and that it issued a defective Certification amendment order for not including a statement of the parties, their positions, findings of fact, conclusions of law, and an indication of the actions of each Commissioner who participated in the matter.<sup>11</sup> This argument is contrary to several years of practice in which the Commission has issued certifications to CLECs without formal proceedings or full orders and, understandably, lacks any case law support. It represents a restatement of Union's argument that it has party rights and, consequently,

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<sup>10</sup> Union Motion, pp. 1, 5 (citing PUC 203.12 and RSA 541-A:31 through 541-A:38).

<sup>11</sup> Union Motion, pp. 2, 6 (citing RSA 363:17-b and 541-A:35).

legal standing to participate as a party in MetroCast's certification application with the Commission, and fails for the reasons discussed in Section I above. A contrary finding that all CLEC applications necessarily trigger a full notice and comment proceeding, with examination of evidence, procedural formalities, and a full Commission order and statement of reasons, also would impose significant burdens on the time and costs associated with CLEC entry in New Hampshire and constitute an anti-competitive entry barrier.

**B. The Commission Has Not Treated CLEC Applications as Modifying Service Boundaries Under RSA 374:22-e.**

In similar fashion, Union also argues that a CLEC request for certification should be classified as a situation where two or more utilities "find that they provide the same service in the same area" or constitute an application to "define, alter or establish service territories" under RSA 374:22-e.<sup>12</sup> As such, Union argues that such proceeding triggers full notice and public hearing requirements. However, applications for CLEC status are not the boundary disputes between regulated ILECs targeted by this Section of the Revised Statutes, which was enacted in 1990 prior to the onset of competition. To MetroCast's knowledge, CLEC applications have never been subject to Section 374:22-e and it is inapplicable to the instant dispute.

**C. Union's Reliance on PUC 431 as a Bar to MetroCast's Entry is Preempted by the Recent Statutory Amendments.**

Union argues that because PUC 431.01(d) fails to authorize certification requests applicable to service territories occupied by ILECs subject to the exemption from ILEC interconnection obligations pursuant to 47 U.S.C. § 251(f), MetroCast is barred from

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<sup>12</sup> Union Motion, p. 6.

filing a CLEC certification request and must instead file a separate waiver petition with the Commission subject to full notice and comment requirements.<sup>13</sup> The PUC 431 rules were enacted under the previous statutory scheme in which CLECs were barred from applying for certification in exempt areas, pursuant to RSA 374:22-f and 22-g. The PUC 431(d) prohibition on applying for exempt areas was preempted by the recent state statutory change expressly permitting such entry and cannot bar MetroCast's application under the PUC 400 rules or the Commission's certification decision in favor of MetroCast.<sup>14</sup> In any event, the Commission already found that PUC 431 "does not expressly limit CLEC registrations to non-exempt ILEC service territories," and that "[r]eading such a limitation into the rules would raise issues of federal preemption...."<sup>15</sup>

**D. The Commission Was Not Required to Notify Municipalities of the MetroCast Application.**

As a final procedural argument, Union argues, again without any case support, that the Commission was required by RSA 541-A:39 to provide notice to municipalities of the MetroCast certification.<sup>16</sup> Section 541-A:39 imposes a general obligation on the Commission to give notice to affected municipalities with respect to permits and other form of Commission action that "directly affects the municipalities."<sup>17</sup> MetroCast's telephone service is offered over the pre-existing facilities of MetroCast's cable

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<sup>13</sup> Union Motion, pp. 6-7.

<sup>14</sup> Allowing PUC 431(d) to prevent entry into rural ILEC territories in light of the revised 347:22-g would allow a PUC rule to "detract from or ...modify the statutory law" (see Union Motion, p. 5), an outcome which Union acknowledges is unacceptable.

<sup>15</sup> See Comcast Phone of New Hampshire, LLC Request for Authority to Provide Local Telecommunications Services, DT 08-013, Order Nisi Granting Application (April 4, 2008), p. 4.

<sup>16</sup> Union Motion, pp. 7-8.

<sup>17</sup> Id.

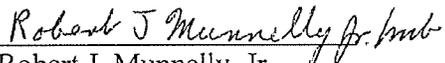
operations and of MetroCast's CLEC partner, IDT. The grant of the certification would have no direct affect on municipalities that would require notice and an opportunity to submit "data, view, or comments" pursuant to Section 541-A:39.

**CONCLUSION**

For the foregoing reasons, MetroCast was properly granted an expanded CLEC certification that included the MetroCast territories served by Union as the ILEC. In light of the statutory changes expressly authorizing CLEC entry into all New Hampshire telephone service areas, Union has not established party status in the certification proceeding sufficient to suspend or rescind MetroCast's expanded certification and justify full public notice and public hearings. Union's remaining procedural arguments lack merit or persuasiveness, and should be rejected.

METROCAST CABLEVISION OF  
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