

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 09-

**Petition by Certain Rural Telephone Companies
Regarding CLEC Registration of segTEL, Inc.**

Granite State Telephone, Inc. ("GST"), , Dunbarton Telephone Company, Inc. ("DTC"), Bretton Woods Telephone Company, Inc. ("BWT") and Dixville Telephone Company ("Dixville"), each a rural local exchange carrier and a rural telephone company (together, the "RLECs"), hereby petition for a determination that the Form CLEC 10 registration purporting to authorize segTEL to engage in business as a telephone utility within the service territories of the RLECs be declared null and void or, in that such registration be rescinded due to:

- A. the failure of the Commission to provide notice to interested parties, an opportunity for hearing and make required findings pursuant to RSA 374:26, 374:22-g and 374:22-e, as well as Puc 203.12, RSA 541-A:31 and RSA 541-A:35, prior to issuing or authorizing the issuance of such authority;
- B. the failure of the Commission to comply with RSA 363:17-b and RSA 541-A:35 which require the issuance of a final order by the Commission, which order is required to include the parties, their positions, findings of fact, conclusions of law, and an indication of the action of each Commissioner who participated in the matter;

- C. the mistake of fact and law involved in the Commission (or its staff) utilizing Puc 431.01 and its Chapter 431 process, as said rule and Chapter only authorizes issuances of registrations in areas served by non-exempt ILECs, not the areas served by the RLECs (which are not served by non-exempt ILECs); and
- D. for the other reasons detailed herein.

In support hereof, the RLECs state the following:

1. Each of the RLECs is a telephone public utility as defined in RSA 362:2 and is regulated by the Commission. The RLECs provide telecommunications services to residential and business customers and access services to utilities. Each of the RLECs has fewer than 25,000 access lines, and is a rural telephone company as that term is defined at 47 U.S.C. § 153(37) and as that term is used in 47 U.S.C. § 251(f)(1). None of the RLECs has waived the exemption provided to rural telephone companies under that section of the federal statutes.
2. BWT is the incumbent local exchange carrier providing service within the Town of Carroll and certain abutting unincorporated areas.
3. Dixville is the incumbent local exchange carrier providing service within Dixville Notch, New Hampshire.
4. DTC is the incumbent local exchange carrier providing service to the town of Dunbarton and portions of the towns of Bow and Goffstown.
5. GST is the incumbent local exchange carrier providing service to the towns of Chester, East Deering, Hillsboro Upper Village, Sandown, Washington, Weare and Windsor, as well as sections of the towns of Antrim, Auburn, Derry, Hopkinton and New Boston.
6. In December, 2008, the RLECs became aware that segTEL had filed a Form CLEC 10 application for registration which was labeled as an amendment to a prior registration

for authority to serve all telephone exchanges within New Hampshire, including those served by the RLECs.

7. On December 17, 2008, the New Hampshire Telephone Association (“NHTA”), on behalf of the RLECs, filed with the Commission the letter attached hereto as Exhibit 1 in which NHTA asserted that any such certification could only be effected through compliance with RSA 374:22, RSA 374:22-g and RSA 374:26, not through registration under Puc 431.01.

8. On March 3, 2009, the Commission issued a certificate attached hereto as Exhibit 2 which purports to authorize segTEL to provide local exchange service in all the exchanges in New Hampshire, including those served by the RLECs.

9. The Commission did not provide the RLECs with, nor did it issue or require any notice of the application or provide notice of any opportunity for hearing. To the best of the RLECs’ knowledge, there was no hearing or opportunity for hearing. The Commission’s March 3, 2009 issuance does not contain any findings of fact or conclusions of law. The issuance also contains no finding of public good.

10. The grant of such authority in each RLEC’s territory may have an impact upon “the incumbent utilities opportunity to realize a reasonable return on its investments”, may have an impact on universal service and may have an impact on meeting carrier of last resort obligations in the respective RLEC service territories. The rights and privileges of the RLECs are directly impacted by a grant of authority to segTEL to provide telecommunications service in respective RLEC service territories.

11. No order was issued by the Commission granting authority to segTEL.

14. The issuance of the amended CLEC 10 registration March 3, 2009 involves errors of law because under RSA 374:22, 374:26, 374:22-g, 374:22-e, 541-A:31 and other applicable

law, and constitutional due process requirements (N.H. Const., Part I, Art. 15; U.S. Const. Amend. XIV) the Commission is required to provide for a hearing, make findings based upon evidence before it which address particular factors in those statutes and then to make conclusions based on those findings on whether granting segTEL's application is in the public good. Such evidence findings and conclusions must be specific to the service territory and applicant involved in a request for authority.

15. Actions by administrative agencies that involve the legal rights and privileges of parties, such as the rights of the segTEL and the RLECs (the incumbent telephone utilities in this matter), are contested cases as defined by the New Hampshire Administrative Procedure Act. RSA 541-A:1(IV). New Hampshire statutes and Commission rules require adjudicatory procedures which require notice and hearing in such situations. RSA 374:22, 374:22-g, 374:26, 541-A:1(I), 541-A:31 through 541-A:38, Puc 203.12. RSA 374:22-e also requires notice to interested parties in actions involving authorizations for more than one telephone utility in a service territory.

16. Administrative agencies, such as the Commission, must act within their delegated powers. *Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 289 (1981); *Kimball v. N.H. Board of Accountancy*, 118 N.H. 567, 568 (1978). Rules and orders adopted by state agencies may not add to, detract from or in any way modify the statutory law. See *Kimball, supra*. Thus, the Commission's rules do not in any way limit the legal requirements discussed above as required by RSA 374:26, 374:22-g, 374:22-e and other applicable law or limit the rights of the RLECs or any other party pursuant to the U.S. and New Hampshire Constitutions.

17. In docket DT 08-013, *RE: Comcast Phone of New Hampshire, LLC Request for Authority*, ORDER GRANTING HEARING (August 18, 2008), the Commission provided an

opportunity for hearing, after previously noticing said matter. In so ruling it stated “[w]e will schedule a hearing pursuant to RSA 374:26, which requires a hearing if all interested parties are not in agreement, to consider evidence by Comcast and other parties concerning whether a grant of franchise authority to Comcast in the KTC, MCT and WTC service territories is for the public good.”

18. In contrast, in the case at hand, the Commission conducted no inquiry to see if parties were in agreement, and provided no notice to interested parties (such as the RLECs), no procedure to request a hearing and no opportunity for hearing. The different treatment provided to the RLECs and others who may be interested in this case versus interested parties in the above-referenced Comcast case is unjustified and arbitrary, is without basis in law, and denies the RLECs and other interested parties in this case their due process rights as guaranteed by the U.S. and New Hampshire Constitutions.

19. The application for authority by segTEL is a request for authority to operate as a public utility as defined by RSA 362:2 and is governed by RSA 374:26, 374:22-g and 374:22-e. RSA 363:17-b requires the issuance of a final order by the Commission on *all* matters presented to it. That statute requires that such orders reflect, among other things, the parties, the position of the parties and the concurrence or dissent of each Commissioner participating in the matter.

20. Similarly, RSA 541-A:35 requires the Commission to issue final orders in contested cases such as this one which include findings of fact and conclusions of law. In fact, there is no evidence in the issuance that any Commissioner even participated in the issuance of the March 3, 2009 authorization letter.

21. The explicit language on Commission rule Puc 431.01 only applies in the territories of non-exempt ILECs, which the RLECs are not. Thus, any document that purports to

provide authority in the RLEC's territories issued pursuant to that rule is invalid and should be declared null and void or rescinded.

22. Commission Rule Puc 431.01(d) states that an issuance under that rule "authorizes the applicant to provide competitive local exchange service in the territory of *non-exempt ILECs*" (emphasis added). Commission rule Puc 402.33 provides that "[n]on-exempt ILEC means an ILEC that is not exempt pursuant to 47 U.S.C. § 251(f)." Each of the RLECs is a rural telephone company as that term is used in 47 U.S.C. § 251(f)(1). None of the RLECs has waived the exemption provided to rural telephone companies under 47 U.S.C. § 251(f). Thus, none of the RLECs' service territories is territory served by a non-exempt ILEC.

23. Since the rule only purports to provide for authority in the territory of non-exempt ILECs and since the RLECs' territories are not such territories, the rule does not apply to issuances of authority in the RLEC's territories. Entities that file applications for authority to provide service in the service territory of an ILEC that is not a non-exempt ILEC, such as the segTEL request, are required to file a petition that complies with Commission rules PUC 203.05 and 203.06, among others. Thus, the Commission should rule that the March 3, 2009 issuance is null and void or rescind it, as it was not authorized under the rule it was issued under.

WHEREFORE, the RLECs respectfully request this Commission to declare null and void, or rescind, the amended authorization issued March 3, 2009 for segTEL to engage in business as a telephone utility within the service territories of the RLECs.

Respectfully submitted,

GRANITE STATE TELEPHONE, INC.
DUNBARTON TELEPHONE COMPANY, INC.
BRETTON WOODS TELEPHONE COMPANY,
INC.
DIXVILLE TELEPHONE COMPANY

By Their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: October 15, 2009

By: _____



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Exhibit 1

**DEVINE
MILLIMET**

ATTORNEYS AT LAW

December 17, 2008

FREDERICK J. COOLBROTH
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**VIA E-MAIL AND
HAND DELIVERY**

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: segTEL, Inc. Application for Certification

Dear Ms. Howland:

This letter is written on behalf of certain rural telephone company members of the New Hampshire Telephone Association, namely, Granite State Telephone, Inc., Merrimack County Telephone Company, Kearsarge Telephone Company, Dunbarton Telephone Company, Inc., Bretton Woods Telephone Company, Inc., Northland Telephone Company of Maine, Inc. and Dixville Telephone Company (the "NHTA Companies").

The NHTA Companies have become aware of a filing by segTEL, Inc. ("segTEL") seeking to conduct business as a telephone utility throughout the state, including in the exchange service territories served by the NHTA Companies. This letter is being submitted in order to preserve the legal position of the NHTA Companies. The Commission has not, as of yet, opened a docket in this matter, and there is, therefore, no formal proceeding within which to intervene. The NHTA Companies reserve all of their rights to assert the issues raised herein in future proceedings, and to respond to additional issues that might arise in any such proceedings. Pursuant to RSA 374:26, the NHTA Companies respectfully assert that they are not in agreement with the application and request a hearing thereon.

In the 2008 legislative session, the New Hampshire Legislature enacted Senate Bill 386, which became Laws 2008, Chapter 350. This law repealed RSA 374:22-f, which related to the service territories of telephone utilities serving fewer than 25,000 access lines.

At the same time, the Legislature amended RSA 374:22-g to delete provisions limiting its application to companies serving more than 25,000 access lines. The statute as amended reads 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.”

The effect of this legislative change is to create a new regulatory process for competitive entry into the service territories of rural telephone companies. The statute contemplates specifically a finding of public good and prescribes factors to be considered by the Commission in determining whether entry is consistent with the public good. This statute should be read in conjunction with RSA 374:22, which is the statute of general applicability with regard to authorization to engage in business as a public utility, and RSA 374:26, which requires a hearing for ruling on such applications unless interested parties are in agreement. 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).

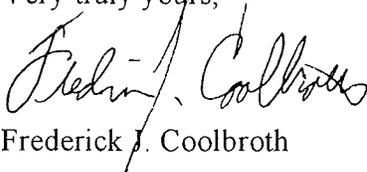
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The NHTA Companies believe that the Commission's existing simplified registration process in the Commission's Part 431 rules is not applicable to this filing. Puc 431.01(d) expressly provides that the authorization granted through such a registration extends to the service territories of "non-exempt ILECs". The NHTA Companies are exempt ILECs, and this process does not apply.

The factors involved in serving and providing universal service to rural telephone company service territories are materially different from those of the large ILECs. This difference was expressly contemplated in the rulemaking process relating to the PUC's Part 431 rules. To the extent that the PUC Part 431 process is consistent with the statutory framework as it relates to large ILECs (a matter as to which the NHTA Companies express no opinion), it is not applicable to the NHTA Companies, which have small, rural service territories. We note that the Commission has commenced a rulemaking proceeding to amend its Part 431 rules.

The NHTA Companies respectfully request that, prior to the granting of the requested authorization, the Commission conduct a hearing at which the NHTA Companies may present evidence regarding the public good standard as it relates to this application.

Very truly yours,



Frederick J. Coolbroth

FJC:kaa

cc: Office of Consumer Advocate
Kath Mullholand

Exhibit 2

AUTHORIZATION TO PROVIDE LOCAL EXCHANGE SERVICE

segTEL, Inc.

is authorized to provide local exchange service in the State of New Hampshire in all New Hampshire exchanges.

Debra A. Howland
Executive Director

Date: March 3, 2009

Authorization No. **DT 99-048** and Order No. **23,208**

This authorization is non-transferable
Pursuant to Puc 451.01(g)