

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-013

COMCAST PHONE OF NEW HAMPSHIRE, LLC

**Request for Authority to Provide
Local Telecommunications Services**

Order Granting Hearing

ORDER NO. 24,887

August 18, 2008

APPEARANCES: Mintz Levin by Cameron F. Kerry, Esq. for Comcast Phone of New Hampshire, LLC; Devine Millimet & Branch by Frederick J. Coolbroth, Esq. and Patrick C. McHugh, Esq. for New Hampshire Telephone Association and the TDS Companies; Rothfelder Stern, LLC by Martin C. Rothfelder, Esq. for Union Telephone Company d/b/a Union Communications; Office of the Consumer Advocate by Meredith A. Hatfield, Esq. on behalf of residential ratepayers; and F. Anne Ross, Esq. of the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

On December 12, 2007, Comcast Phone of New Hampshire (“Comcast”) filed an application for authority to provide local exchange telecommunications services pursuant to RSA 374:22 and to do business as a competitive local exchange carrier (“CLEC”) in the service territories of three affiliated incumbent local exchange carriers (ILECs) – Kearsarge Telephone Company, (KTC) Merrimack County Telephone Company (MCT) and Wilton Telephone Company (WTC) – all subsidiaries of TDS Telecom (collectively, the TDS Companies). Comcast completed the required attachments to its CLEC application on January 22, 2008. Comcast is a CLEC currently authorized to provide intrastate telecommunications services in the New Hampshire exchanges formerly served by Verizon and now served by Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint).

On April 4, 2008, the Commission issued Order No. 24,843 on a *nisi* basis, granting Comcast's application for authority effective May 5, 2008, unless any interested party filed comments or requested a hearing. On April 16, 2008, the TDS Companies filed a motion for suspension of Order No. 24,843 pending resolution of Docket No. DT 07-027 (the TDS Companies' petition for alternative regulation under RSA 374:3-b) or, alternatively, for a hearing. On April 21, 2008, the New Hampshire Telephone Association (NHTA) filed an Objection to Order No. 24,843 and requested a hearing. Comcast filed an objection to the TDS motion and a response to the NHTA objection on April 30 and May 2 respectively.

On May 2, 2008, the Commission issued Order No. 24,854 suspending the order *nisi* and scheduling a prehearing conference. Following that order, the TDS Companies, NHTA and Union Telephone Company filed petitions to intervene and the Office of Consumer Advocate entered an appearance on behalf of residential ratepayers pursuant to RSA 363:28.

On May 21, 2008, Comcast filed an objection to the petitions to intervene and the prehearing conference was held as noticed. At the prehearing conference the Commission granted all petitions to intervene, finding the parties had demonstrated that their rights, duties, privileges, immunities or other interests would be affected by this proceeding. Following the prehearing conference, the parties and staff met in a technical session and agreed to a procedural schedule including discovery, an additional technical session to develop stipulated facts, and written briefs. The Commission approved the proposed schedule on June 11, 2008.

On June 18, 2008, Staff filed a letter attaching stipulated facts, which the parties agreed would provide a basis for briefs. On June 26, 2008, NHTA, MCT and KTC, referred to collectively as NHTA unless otherwise indicated, filed a joint brief; Union also filed a brief.

Comcast filed its brief on June 27, 2008. NHTA filed a reply letter on July 14, 2008, and Comcast filed a reply brief on July 15, 2008.

SegTEL, another CLEC, filed a motion to intervene on July 22, 2008, stating it had a substantial interest in the proceeding since it is a public utility offering competitive services. SegTEL noted that some parties objected to its late intervention and stated it would accept the process where it was, and that it did not intend to delay the proceedings.

I. POSITIONS OF THE PARTIES

A. NHTA

NHTA contends the Commission may not authorize Comcast to commence business in the TDS service territory without finding “after due hearing” that the application is for the public good pursuant to RSA 374:26. NHTA suggests that the record evidence is insufficient to find that Comcast has met its burden of proof and that Comcast has not satisfied the requirements to become certified. According to NHTA, Comcast listed only two telecommunications services on its CLEC-10 application, but N.H. Code Admin. Rules Puc 449.07 (d) requires that three telecommunications services be listed. NHTA states that there is no record evidence that Comcast will ultimately provide the listed services and asserts that Comcast seeks certification in order to provide information-based telephone service, which is not within the Commission’s jurisdiction.

NHTA suggests that if the Commission disagrees with its analysis of the evidence, the Commission should condition authorization on three requirements: (1) Comcast should be required to complete a new CLEC-10 application, certifying Comcast will provide the listed telecommunications services, and signed under oath, (2) Comcast should be required to file its business plan with the Commission, on a confidential basis, so the Commission can verify the

representations on the CLEC-10 application, and (3) the Commission should open a generic proceeding to determine the regulatory treatment of services using the Voice over Internet Protocol (VoIP) in the absence of Federal Communications Commission (FCC) action on the issue.

In its letter in lieu of a reply brief dated July 14, 2008, NHTA agreed with Comcast that this docket should be limited to whether Comcast's registration application as a CLEC should be approved. Consequently, according to NHTA, the facts in Comcast's initial brief regarding Comcast's authorization in the territory of incumbent carrier FairPoint Communications should be ignored. NHTA points out that Comcast agreed in the stipulation of facts that it was not relying on its local interconnection service for certification even though Comcast later reserved its right to make such assertion, and that the Commission should not consider the service in reaching its decision on Comcast's certification. Finally NHTA complains that it would be unfair to certify Comcast and allow it to compete against TDS with Comcast unregulated digital voice service.

B. Union Telephone

Union contends that RSA 374:22-f expressly denies the Commission authority to authorize competitive providers in the service territories of telephone utilities with less than 25,000 access lines unless the incumbent requests such action. Union also points out that to authorize competitive entry the Commission must consider the requirements in RSA 374:22-e and 374:22-g, and because the Commission has no evidence on these requirements it cannot grant the requested authority. Finally, Union contends that federal preemption does not extend the Commission's authority to grant the petition and suggests that Comcast seek authority from the legislature.

C. Comcast Phone

Comcast asserts it has met all requirements for CLEC certification and that such certification is for the public good. According to Comcast, it offers retail service in FairPoint's franchise area and will do the same in the TDS franchise area. Comcast's affiliate, Comcast IP Phone II, LLC (Comcast IP), also offers Comcast Digital Voice service, an interconnected VoIP service, to New Hampshire residential customers and Comcast will provide Comcast IP with interconnection services. Comcast points out that the Commission considered the interests of competition, fairness, economic efficiency, universal service and carrier of last resort obligations in Order No. 24,843, granting Comcast's request for authorization in TDS' territory and that no party questioned the finding in their subsequent petitions.

In its reply brief, Comcast counters the NHTA argument that its application only lists two telecommunications services by pointing out that the original CLEC-10 application listed access, exchange access and interexchange service as three primary telecommunications services and Comcast's supplemental filing listed two specific retail products that would be offered to the public. Comcast clarifies that these two retail products include the three services listed in the original CLEC-10. Comcast also points out that three of five approved CLEC-10 applications it reviewed listed only two services and therefore Comcast concluded the rules have not been applied as NHTA asserted they must.

Comcast contends that NHTA's arguments about whether Comcast will in fact offer the retail products it proposes are irrelevant since Comcast has two years to offer service before forfeiting its authority. Comcast dismisses the NHTA's three proposed conditions as unnecessary and beyond the scope of this proceeding.

Comcast rebuts Union's arguments that the Commission is barred from authorizing a CLEC in a territory served by an incumbent with fewer than 25,000 access lines by pointing out that the legislature repealed RSA 374:22-f and revised RSA 374:22-g, making the Commission's authority to approve CLEC applications the same, irrespective of the size of the incumbent telephone utility.¹

II. COMMISSION ANALYSIS

A. Comcast Compliance with Commission CLEC Registration Rules

Based upon our review of the stipulated facts, the Comcast CLEC-10 Application as filed and supplemented and the briefs filed, we find that Comcast has met the requirements of our CLEC registration rules as we interpret them. *See* Order No. 24,843. Comcast's initial application lists three telecommunications services and Comcast has demonstrated that those three services will be offered through two specific retail telecommunications offerings. Since Comcast is already offering one of its proposed services, the local business service, in other parts of New Hampshire, we accept Comcast's representation that its CLEC-10 describes services that will be offered in the TDS territory. Issues regarding whether and when Comcast offers retail telecommunications service to TDS customers are matters of enforcement.

The question of whether Comcast IP's new digital voice service is a regulated telephone service is an important regulatory issue. As we noted at the prehearing conference, however, the regulatory status of Comcast IP's digital voice service is not the subject of this docket and does not bear on whether we should expand Comcast's authority to operate in New Hampshire. This is because Comcast has represented that it will provide other retail telephone services that qualify it for CLEC registration in the TDS franchise area.

¹ Laws of 2008, Chapter 350, signed into law July 7, 2008, for effect September 5, 2008.

B. Hearing

RSA 374:22 requires Commission approval before a company may commence business as a public utility in any town in which it is not already engaged in such business. RSA 374:26 requires that we consider the public good in granting utility franchises. The enactment of changes to RSA 374:22-g makes it clear the legislature intends to allow competition in all areas of the state.

When the Commission adopted N.H. Code Admin. Rules Puc 431.01, it considered the interests of competition with other factors including, 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 pursuant to RSA 374:22-g, III. Although our current CLEC registration rules provide an appropriate balance between the interests of incumbent telecommunications providers and those of competitive entrants, we agree that the parties to this docket should have an opportunity to present any facts relevant to our consideration of the public interest. We 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.

C. SegTEL's Request for Intervention

We will grant segTEL's petition to intervene. SegTEL is a registered CLEC doing business in New Hampshire in areas outside of the TDS Companies' service territories. Given that status we find that segTEL's rights, duties, privileges, immunities or other substantial interests may be affected by this proceeding. *See* RSA 541-A:32. In light of the late stage of

this docket, and to protect the rights of other parties who more timely intervened, we will require segTEL to participate in a manner consistent with the procedural schedule contemplated in this order.

Based upon the foregoing, it is hereby

ORDERED, Comcast Phone of New Hampshire's petition for authority to provide telecommunications services and do business as a competitive local exchange carrier in the service territories of Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company is complete and complies with Commission rules governing CLEC applications; and it is

FURTHER ORDERED, that segTEL's petition to intervene is granted; and it is

FURTHER ORDERED, that Comcast Phone of New Hampshire and all other parties wishing to testify at the hearing shall submit prefiled written testimony on or before September 9, 2008, concerning whether allowing Comcast Phone of New Hampshire to offer telecommunications service in the Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company service territories is consistent with the public good; and it is

FURTHER ORDERED, that the parties shall hold a technical session to conduct discovery on prefiled testimony on September 12, 2008, or at a time mutually convenient to the parties; and it is

FURTHER ORDERED, that a hearing on whether granting the Comcast Phone of New Hampshire CLEC application is consistent with the public good shall be held on September 22, 2008, beginning at 10:00 a.m. at the Commission offices at 21 S. Fruit Street, Concord, New Hampshire.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of August, 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Lori A Normand
Assistant Secretary