

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-013

COMCAST PHONE OF NEW HAMPSHIRE

Application for Authority to Serve Customers

in the TDS Service Territories

Order Denying Motion for Rehearing

ORDER NO. 24,958

April 21, 2009

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 or TDS). 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.

On April 4, 2008, the Commission issued Order No. 24,843, 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 to suspend Order No. 24,843 pending resolution of Docket No. DT 07-027,¹ or alternatively for a hearing. On

¹ Docket DT 07-027 involved the TDS Companies' petition for alternative regulation pursuant to RSA 374:3-b.

April 21, 2008, the New Hampshire Telephone Association (NHTA) filed an objection to Order No. 24,843 and requested a hearing. 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, Union Telephone Company, segTEL, and the Office of Consumer Advocate were made parties to the docket. The parties and Staff engaged in technical sessions, agreed to stipulated facts, filed written testimony and submitted several rounds of briefs.² At the parties' request, the Commission canceled the final hearing scheduled in this matter and decided the issues in controversy based upon pre-filed testimony and briefs.

On February 6, 2009, pursuant to RSA 374-22-g and N.H. Code of Admin. Rules Puc 431.01, the Commission issued Order No. 24,938 granting Comcast authority to operate as a CLEC in the TDS territories. On March 6, 2009, the Joint ILECs and Wilton Telephone Company, Inc., (the rural local exchange carriers or RLEC Representatives) filed a joint motion requesting that the Commission reconsider Order No. 24,938 (Order) or grant a rehearing in this docket. On March 16, 2009, Comcast provided a response to the joint motion of the RLEC Representatives.

II. POSITIONS OF THE PARTIES

1. RLEC Representatives

The RLEC Representatives claimed that the Commission committed reversible error in both the grant of authority allowing Comcast to operate as a CLEC, and in the requirement for the TDS Companies to interconnect with Comcast. The RLEC Representatives argued that Comcast has not demonstrated under New Hampshire law that it will provide telephone service "for the public" as required by RSA 362:2.

² For a more detailed procedural history see Order No. 24,938.

According to the RLEC Representatives, Comcast did not offer evidence of any customers for its business local exchange services or its specialized “schools and libraries” service. In addition, the RLEC Representatives pointed out that Comcast discontinued Comcast Digital Phone service in the state of New Hampshire (FCC Public Notice DA 08-871, April 14, 2008, p. 2). The RLEC Representatives claimed that the service offerings described by Comcast are “merely a pretext to enable Comcast Phone to obtain interconnection” with the public switched telephone network (PSTN) and thereby enable its affiliate, Comcast IP Phone II, LLC (Comcast IP), to provide internet protocol (IP) voice service on an unregulated basis. The RLEC Representatives maintained that, in accordance with *Appeal of Easton* 125 N.H. 205, 213 (1984), the Commission must not treat the “public good” requirements of RSA 374-22-g and RSA 374:26 as merely a “check the box” analysis, but must demand that Comcast demonstrate that it intends to serve the public. The RLEC Representatives asserted that Comcast has not demonstrated that it intends to serve the public and the Commission must therefore withhold approval.

The RLEC Representatives argued in addition that the Order is “unlawful and unreasonable in that it fails to consider whether the proposed conduct would be contrary to law.” The RLEC Representatives noted that granting authority for Comcast to operate as a CLEC will enable Comcast IP to offer “Comcast Digital Voice” (CDV) in the TDS Companies’ area “free from any regulation.” In this and in previous communications to the Commission, the RLEC Representatives have asked for a determination of whether CDV is a telecommunications service under New Hampshire law and is therefore subject to regulation.³ The RLEC Representatives noted that, if CDV is indeed a telecommunications service, the offer of CDV to the public

³.CDV is provided using Internet Protocol and has not yet been classified as a telecommunications or information service.

without prior Commission approval would violate the provisions of RSA 374:22 and RSA 374:22-g. The RLEC Representatives asserted that the “public good” standard includes a requirement that “the proposed action must not be one forbidden by law” and must be “reasonable to be permitted under all the circumstances of the case.” *Grafton County Electric Power and Light Company v. State*, 77 N.H. 539 (1915). The RLEC Representatives asserted that it is unlawful and unreasonable for the Commission to grant Comcast authority to operate as a CLEC without first determining whether CDV is a telecommunications service.

The RLEC Representatives also asserted that the Order is unlawful and unreasonable in that the Commission ruled on matters not in controversy and absent notice and an opportunity to be heard, referring to Subsection G, pp 22-23 which stated:

The TDS Companies are, however, required to provide interconnection to Comcast. Interconnection consists of the physical exchange of traffic between carriers. TDS will incur the cost of terminating traffic from its customers to Comcast customers and will be reimbursed for terminating calls from Comcast customers to TDS customers. These costs will be negotiated between Comcast and the TDS Companies and included in an interconnection agreement.

The RLEC Representatives noted that Comcast had not requested an order concerning interconnection requirements and claimed that applicable law does not include “exchange of traffic” as a necessary component of interconnection. They maintain that the inclusion of these issues in the Order represents a violation of due process, in that interested parties were not forewarned of the potential scope of ruling. The RLEC Representatives suggest that the remedy for this particular concern is a rehearing.

The RLEC Representatives further argued that the Commission has taken too broad a view of the prohibition of “barriers to competitive entry.” They cite Section 253(f) of the Telecommunications Act of 1996 as authorizing more stringent requirements for new entrants.

They further argue that the Commission, in not acknowledging this authority, has failed to give proper weight to fair and level competition.

Finally, the RLEC Representatives claimed that the Order violates New Hampshire RSA 374:22-g, which requires the Commission to consider specific factors before reaching its decision. Specifically, the RLEC Representatives asserted that:

- a. The Commission's decision not to rule on the question of whether Comcast IP's Digital Voice is a telecommunications service (discussed above) and its allegedly limited acknowledgement of Sections 251 and 253 of the Telecommunications Act (also discussed above) constitute a failure to properly consider the fairness criterion;
- b. The Commission has taken an imprecise view of the term "economic efficiency," applying it only to the market as a whole, and accepting questionable claims of the relationship between economic efficiency and barriers to entry; and
- c. With regard to universal service, carrier of last resort, and rate of return issues, the Commission has "demonstrated a misunderstanding" of current law and has effectively shifted the burden of proof regarding the effect of competition on these criteria from Comcast to the RLEC Representatives.

2. Comcast Response

Comcast asserted that the motion of the RLEC Representatives "fails to meet their burden (1) to introduce new evidence that was unavailable at the original hearing, and (2) to identify matters that were overlooked or mistakenly conceived in the original decision." With regard to the claim that Comcast has not established that it will provide service to the public, Comcast observed that a common carrier can specialize in services aimed at particular segments of the entire public, so long as it offers those services without discrimination. Comcast noted several examples of the Commission granting CLEC certification to companies focused on such segments, including, for example, the offer of T1 services. Comcast also asserted that the

current status of its service offerings to the public is not relevant to a Commission grant of certification for market entry.

Comcast argued that the regulatory status of VoIP service need not be determined before proceeding with a decision on CLEC certification. Comcast observed that the Commission's certification of CLEC status grants Comcast authority to offer regulated voice service, and is silent on offering unregulated service. In addition, Comcast disputed the claim that the Order required interconnection, noting that the availability and terms of interconnection are instead being arbitrated separately in Docket No. DT 08-162.

With regard to the claim that the Commission misinterpreted the law regarding barriers to entry, Comcast noted that the cited language in 253(f) of the Telecommunications Act of 1996⁴ simply permits, and does not require, states to impose additional requirements on CLEC applications. Comcast also emphasized that dilatory tactics can themselves become a barrier to entry and urges the Commission to consider that in rejecting the request for rehearing. Finally, Comcast asserted that the RLEC Representatives' claim that the Order violates RSA 374:22-g is not supported with new facts or legal arguments and therefore provides no basis for a rehearing.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. The petitioner must explain why new evidence could not have been presented in the underlying proceeding. *O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977). Good reason may also be shown by identifying specific matters that were either "overlooked or mistakenly conceived" by the deciding tribunal.

⁴ 47 U.S.C. § 253 (f)

Dumais v. State, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003).

The arguments raised in the RLEC Representatives' motion have been previously raised and addressed in the Order and no new previously unavailable evidence has been proffered.

Accordingly, we address the arguments raised only insofar as they are pertinent to demonstrate that matters were not overlooked or mistakenly conceived.

A. Telephone Service for the Public

Comcast has not identified specific customers or pending installation orders for its proposed services. The RLEC Representatives argue that this suggests Comcast does not intend to serve the public and, instead, is planning to use its CLEC standing solely to enable the offering of unregulated VoIP service through an affiliate.⁵ They suggest that the Commission must require a "demonstration through business plans or otherwise" of Comcast's commitment to offering a public service, *see* RLEC Representatives Motion at 3.⁶

The current absence of identified customers for Comcast's proposed services is not a disqualifying factor. In fact, N.H. Code Admin. Rules Puc 431.12(a) provides a 2-year period to obtain customers. We find the presentation of proposed service offerings with applicable rate schedules, pursuant to N.H. Code of Admin. Rules Puc 431.06, and targeted geographical and customer segment markets sufficient to grant Comcast authority to do business as a CLEC. The RLEC Representatives suggestion to evaluate the feasibility of CLEC business plans as an entry

⁵ The Commission considered all evidence presented on this issue, including, but not limited to, the testimony of independent consultant, Ms. Valerie Wimer, submitted by the RLEC Representatives. *See* Order at 9-11.

⁶ No such requirement exists, and the testimony provided by Comcast, from independent consultant Michael D. Pelcovitis, Ph.D., specifically addressed the services to be provided to the public by Comcast and further opined that such services would contribute to the public good. *See* Order at 5-6.

criterion for CLEC certification is beyond the scope of existing CLEC registration requirements and inconsistent with our prior grants of CLEC registration.

B. Effect of Comcast Digital Voice (CDV) Regulatory Status

The RLEC Representatives argue that the CDV service could be determined to be subject to regulation, which would mean that unregulated CDV offers are a violation of law or that CLEC registration of Comcast in the TDS territories will allow Comcast to expand its unregulated CDV service, and therefore Commission approval of the CLEC application advances a potentially illegal activity. Since the public good standard includes a requirement that “the proposed action must not be one forbidden by law,” the RLEC Representatives claim that the grant of CLEC registration is contrary to law.⁷

We observe that CDV has not been ruled a telecommunications service and therefore offers of CDV service are not currently prohibited. The RLEC Representatives essentially seek to expand a ban against actions forbidden by law to a ban against actions that might, at some future date, and depending on future decisions, be prohibited. We find that such a premonitory ban would be unworkable and is not supported by law.

C. Interconnection Definition and Mandate

The RLEC Representatives object that the Order ruled on matters not in controversy and absent notice. They conclude, incorrectly, that the Commission “ordered the TDS companies to interconnect with Comcast Phone.” *See* RLEC Representatives Motion at 8. The RLEC Representatives appear to interpret the statement that “[t]he TDS Companies are, however, required to provide interconnection to Comcast,” to be a direction. The statement, however, should be read not as a direction but as a description of the general federal statutory requirement

⁷ This argument was the subject of our analysis on pages 18-20 of the Order and presents no new issues for the purposes of rehearing or reconsideration.

that local exchange carriers (LECs) interconnect with other carriers operating in their territories.⁸ TDS subsequently argued in a separate proceeding that Comcast is not a carrier and therefore TDS is not obligated to interconnect with Comcast. The extent of the TDS Companies' interconnection obligations to Comcast will be considered in a separate docket. *See*, Docket No. DT 08-162.

The RLEC Representatives further objected that the language in the Order, namely, “[i]nterconnection consists of the physical exchange of traffic between carriers” (Order at 22) introduces a definition of interconnection that is contrary to FCC rulings. This language appears in connection with our responsibility under RSA 374:22-g to consider “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.” As explained above, we did not direct TDS to interconnect and, therefore, a formal definition of interconnection is not at issue in this proceeding.

D. Strictness Regarding Barriers to Competitive Entry

In the Order, we cited 47 U.S.C. § 253 (a), which reads as follows:

No State or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

In isolation that language might appear to allow no standards that could block authorization of CLEC competitors. The RLEC Representatives object that this reflects too narrow a reading of the statute, which provides exceptions including a grant of explicit authority to the states to require that competitors be qualified as “eligible telecommunications carriers” in order to

⁸ 47 U.S.C. § 251 (a) and (b)

compete. The sub-section cited by the RLEC Representatives, 253 (f), does not require state commissions to impose universal service obligations on CLECs, it merely allows for such state requirements. The New Hampshire legislature has not required CLECs to satisfy the requirements of an eligible telecommunications carrier, nor have we imposed such a requirement through our rules.

As our subsequent analysis of RSA 374:22-g in the Order shows, we examined and applied standards under RSA 374:22 and 22-g in our consideration of Comcast's entry into the TDS Companies service territories. We reached our decision by balancing the factors identified in applicable state statutes so as not to "have the effect of prohibiting the ability of [Comcast] to provide any interstate or intrastate telecommunications service." *Id.* In light of that analysis, we find that the RLEC argument asserting too narrow a reading of 47 U.S.C. § 253 is without merit.

E. Fairness, Economic Efficiency and ILEC Competitiveness Criteria

The RLEC Representatives claim that the Commission erred in ruling on fairness without making a determination of the regulatory status of CDV. In the Order we observed that the New Hampshire telecommunications market is already subject to many forms of regulated and unregulated competition, including unregulated cellular voice service and bundled "triple play" offerings that combine regulated and unregulated services. We concluded:

Whether or not those VoIP services are regulated does not impact the fairness of Comcast's entry into the TDS Companies' territories, because we have found that both regulated and unregulated services already contribute to the competitive market in the TDS Companies' service territories. Order at 19.

The RLEC Representatives have provided no basis to grant rehearing or reconsideration on this point.

The RLEC Representatives also claim that the Commission incorrectly assumed that the term "economic efficiency" applied to the overall market rather than to the ILEC and that

eliminating barriers to entry inherently advances economic efficiency. They further assert that the Commission failed to examine the specific effect of the Comcast application in terms of economic efficiency.

We find no ambiguity in the language of RSA 374:22-g regarding the scope of “economic efficiency.” It refers to market-wide efficiency, not to the efficiency of individual companies. For support, we note that the statute specifies more limited application where intended (e.g., “the incumbent utility's opportunity to realize a reasonable return on its investment”). Nor is there evidence elsewhere in the statute of a public policy goal to optimize the economic efficiency of individual regulated companies.

RSA 374:22-g also contemplates that competition and economic efficiency are factors relevant to the determination of public good. It begins by declaring that, absent federal prohibition, all telephone franchises shall be non-exclusive; that is, they may be subject to competition. Since barriers to entry by definition limit competition, we find that state law supports Commission efforts to minimize such barriers consistent with the public good, and within the confines of other governing laws and rules. We further find that there is no requirement in RSA 374:22-g for analysis of the “specific effect” that new competition might have on economic efficiency.

The RLEC Representatives object that the Commission effectively shifted the burden of proof to them regarding universal service, carrier of last resort, and rate of return issues. As explained in the Order, the burden of proof falls first on the petitioning party: Comcast in this case. Where relevant information is the property of other parties, however, they share the burden of production:

Comcast bears the burden of producing evidence reasonably available to it and the TDS Companies bear the burden of producing evidence which is in their exclusive control. (Page 18.)

The RLEC Representatives have provided no basis to grant rehearing on this point.

In summary, the arguments raised by the RLEC Representatives have either been previously raised and addressed in the Order or are mere reformulations of previous arguments with no new, previously unavailable evidence proffered. The RLEC Representatives have failed to demonstrate that we overlooked or mistakenly conceived the matters at issue. In the Order, we weighed all the evidence presented and determined that granting Comcast's CLEC registration is for the public good. Therefore, we deny the pending rehearing request.

Based upon the foregoing, it is hereby

ORDERED, That RLEC Representatives' motion for rehearing and reconsideration is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of April, 2009.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director