

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 08-013

Comcast Phone of New Hampshire, LLC

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

Joint Reply Brief of New Hampshire Telephone Association, Merrimack County Telephone Company and Kearsarge Telephone Company

NOW COME New Hampshire Telephone Association, a New Hampshire voluntary corporation having its principal office at 600 South Stark Highway, Weare, New Hampshire (“NHTA”)¹, Merrimack County Telephone Company, a New Hampshire corporation and a public utility operating pursuant to the jurisdiction of this Commission (“MCT”), and Kearsarge Telephone Company, a New Hampshire corporation and a public utility operating pursuant to the jurisdiction of this Commission (“KTC”, and with MCT collectively the “TDS Companies”) and hereby jointly submit their Reply Brief in the above captioned docket (this “Docket”). The RLEC Representatives’ initial brief addresses the question of whether Comcast Phone of New Hampshire, LLC (“Comcast Phone”), met its burden of proving that its CLEC-10 Application would be in the “public good” pursuant to RSA 374:22-g and RSA 374:26 if granted for providing service in the TDS Companies’ service territory. This reply brief responds to issues raised in Comcast Phone’s initial brief as follows:

¹ NHTA is an association of small incumbent local exchange carriers operating in New Hampshire. NHTA’s members include Granite State Telephone, Inc., MCT, KTC, Wilton Telephone Company, Inc., Hollis Telephone Company, Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc., and Dixville Telephone Company.

1. Do the Commission's rules for submission of a CLEC-10 Application lessen Comcast Phone's burden of establishing that its services serve the public good?

2. Is the evidence proffered by Comcast Phone sufficient to meet its burden of proving that approval of its CLEC-10 Application is in the public good?

NHTA and the TDS Companies (collectively, the "RLEC Representatives") address each of these questions below.

ARGUMENT

- 1. The Commission's administrative rules for submitting the CLEC-10 Application do not lessen Comcast Phone's burden of establishing that the granting of Comcast Phone's CLEC-10 Application would serve the public good.**

Comcast Phone argues that the rules adopted by the Commission applicable to competitive local exchange carriers ("CLECs") presume that entry of a CLEC in the territory of incumbent carriers serves the public good and that the simple registration process adopted by the Commission forestalls further adjudicative hearings on such matters. Such a narrow reading of Puc 431.01 and Puc 431.02 would reduce the Commission's review of CLEC-10 applications to a near rubber-stamping procedure and does not conform to the Commission's broad statutory power to regulate telephone services in New Hampshire. Comcast Phone's reading of this rule also would render meaningless RSA 374:26 and RSA 374:22-g. Such an interpretation effectively (i) would bar affected parties from intervening in proceedings such as the present Docket pursuant to Puc 203.17; (ii) would be contrary to the language contained in Puc 203.17 (standard for allowing intervention by interested parties); and (iii) would be contrary to the language contained in RSA 541-A:31 (allowing this Commission to commence an adjudicative proceeding within the Commission's jurisdiction and also when a matter reaches a stage that is considered a contested case).

In light of the plain language of RSA 374:26 and RSA 374:22-g, the mandates of fostering free and fair competition can not be so simply relegated to a “rubber stamping” process as suggested by Comcast Phone. Instead, Comcast Phone must be held to its burden of establishing that its services serve the public good as required by the governing statutes, RSA 374:26 and RSA 374:22-g. The Commission’s applicable administrative rule, which Comcast Phone failed to cite in its initial brief, supports this proposition and clearly states that the “...party seeking relief through a petition, *application*, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence.” *See* Puc 203.25 (emphasis added).² *See also* Re City of Nashua, 91 N.H. P.U.C. 384, 2006 WL 2927769 (N.H.P.U.C.) (noting that petitioner has burden of proving the truth of any factual proposition) and New Hampshire Trial Handbook, S 9:5 (1995) (noting generally, in civil matters, “the burden of proof rests with the party who asserts the affirmative of an issue.”)

2. The evidence proffered by Comcast Phone is not, in its totality, sufficient to establish that approval of its CLEC-10 Application is in the public good.

RSA 374:22-g identifies six specific factors that the Commission must consider, among others, in determining whether Comcast Phone’s proposed services satisfy the interests of serving the public good. Those factors are: (1) fairness; (2) economic efficiency; (3) universal service; (4) carrier of last resort obligations; (5) the incumbent utility's opportunity to realize a reasonable return on its investment; and (6) 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. RSA 374:22- g(II).

² Indeed, the phrase “preponderance of evidence” has been defined in part as “...evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; ... [i]t is that

Comcast Phone has not met its burden of proof that its entry into the TDS Companies' service territory would be in the public good or would promote free and fair competition considering at least all of the factors listed by the legislature within RSA 374:22-g(II). To the limited extent that Comcast Phone's expert witnesses address any of these specific factors, the RLEC Representatives submit that (i) the testimony is wholly inadequate and (ii) Comcast Phone can not meet its burden of proof.

a. *Fairness and Economic Efficiency*

In attempting to address the factors of fairness and economic efficiency, Dr. Pelcovits' testimony focuses in large part on the effects of competition in a free market system. *See ex.* Pre-filed Testimony of Dr. Pelcovits at ps. 6-8. Yet, when posed with the question of how Comcast Phone's application will increase competition in the TDS Companies' service territory, Dr. Pelcovits offers the simplistic view that two or more service providers creating competition within the marketplace results in benefit to the public. *Id.* at p. 8.11-9.18. Conspicuously absent from Dr. Pelcovits' testimony is whether rural markets, such as those of the TDS Companies, can support multiple competitors over a sustainable period of time so as to avoid the replacement of a single regulated telephone company by a single unregulated entity. Concepts of fairness and economic efficiency are more complex when dealing with small, rural markets with limited resources than Dr. Pelcovits' grandiose statements about the free market system suggest. *See ex.* Pre-filed Testimony of Ms. Valerie Wimer, at ps. 9.10-21 - 10.1-10. Yet, Dr. Pelcovits' testimony does not even scratch the surface of trying to address these complex issues in any real or meaningful way.

degree of proof which is more probable than not." *See Black's Law Dictionary* (6th Ed.), p.1182.

b. *Universal Service and Carrier of Last Resort Obligations*

Likewise, in addressing issues related to universal service and carrier of last resort, Dr. Pelcovits draws from general data from the Federal High Cost Universal Service Fund, unrelated testimony in a separate matter before the Commission and a general press release. His testimony is bereft of analysis of how universal service and carrier of last resort obligations, and Lifeline and Link-up offerings will be (or may be) impacted in the TDS Companies' service territories if Comcast Phone's application is granted. Thus, the RLEC Representatives submit that this evidence should be discounted by the Commission.

c. *Reasonable Return on Investment and Recovery of Expenses*

Finally, Comcast Phone offers little in the way of real analysis of the RLEC Representatives' opportunities to realize a reasonable return on their investment. Dr. Pelcovits' espoused a market theory in offering his conclusion that "an efficient, well managed market incumbent should be able to respond to competitors and still recover a reasonable return on past and future investment". *Id.* at p. 11. Dr. Pelcovits' testimony regarding recovery of expenses is equally unavailing as he draws facts and circumstance from a Vermont matter with little to no relevance to this proceeding.

In reviewing the six factors identified in RSA 374:22-g, it is not an exaggeration to state that Comcast Phone has provided almost no substantive evidence as to whether granting its CLEC-10 Application serves the public good. In contrast, testimony has been offered by the RLEC Representatives that is both specific and credible with respect to the potential adverse effects of granting Comcast Phone authority to provide telecommunications services in the TDS Companies' service territories. Ms. Valerie Wimer, the expert witness for the RLEC Representatives, reviewed the regulatory environment which governs the TDS Companies'

operations and addressed factors related to competition, fairness, carrier of last resort obligations, economic considerations and return on investment. Ms. Wimer concluded that the different regulatory requirements between the TDS Companies, on the one hand, and Comcast Phone, on the other hand, would result in a competitive environment heavily skewed in Comcast Phone's favor. *See ex.* Pre-filed Testimony of Valerie Wimer at ps. 3.20-4.3. Her analysis was based upon the different pricing rules, reporting rules and consumer protection rules applicable to the TDS Companies and Comcast Phone. *Id.* at p. 8. Her testimony goes beyond market theory and concretely addresses the likely ramifications of approving Comcast Phone's CLEC-10 Application.

Additionally, Ms. Wimer's analysis and conclusions are consistent with those made in other jurisdictions. In *Time Warner Cable Information Services (South Carolina) LLC v. Public Service Commission of South Carolina*, 660 S.E.2d 497, 499-500 (S.C. 2008), the South Carolina Supreme Court affirmed the denial of Time Warner's proposed expansion into an ILEC service territory based upon testimony demonstrating that the proposed expansion would have an adverse impact on the affordability of rural telephone service. The South Carolina decision provides further support for Ms. Wimer's and the RLEC Representatives' position that expansion into rural markets should not necessarily be prohibited, but should be completed in deliberate and measured manner so as to ensure fair and healthy competition in those markets. *See also Iowa Utilities Board v Federal Communications Commission*, 219 F.3d 744, 761 (8th Cir. 2000), *vacated in part on other grounds*, 535 U.S. 467 (2002) and 301 F.3d 957 (2002), (Eighth Circuit Court of Appeals holding, in the context of applicable law related to the termination of the rural exemption pursuant to Section 251(f)(1)(A) of the Communications Act of 1934 (as amended), that "[t]here can be no doubt that it is an economic burden on an

incumbent local exchange carrier (ILEC) to provide what Congress has directed it to provide to new competitors in 251(b) or 251(c) [of the Act].”)

Yet Comcast Phone asserts that “[f]airness hardly supports maintaining a monopoly” and that the Commission needs to “...take into account fairness to consumers...” According to Comcast Phone, “[f]ailure to allow competitive entry into [the TDS Companies’] service territory would be unfair to those consumers.” *See* Initial Brief of Comcast Phone, p.8, October 1, 2008. While such broad statements read well in a vacuum, Comcast Phone cites no authority for the proposition that an unregulated entity providing an unregulated product (i.e., Comcast Phone’s digital voice) in the service territory of a regulated incumbent local exchange carrier constitutes “free and fair” competition that would be in the public good.

3. The Commission may impose conditions on a CLEC’s authorization to provide services in New Hampshire.

Comcast Phone asserts in its brief that “[t]here is no basis in New Hampshire law to treat Comcast Phone differently from any other CLEC.” *See* Brief of Comcast Phone of New Hampshire, LLC on the Public Good of Its Application, Section III, p. 13. Comcast Phone asserts, for example, that the conditions recommended by Ms. Wimer are “...inconsistent with State and Federal Law and policy.” *Id.* These assertions simply are not correct. Not only does applicable law specifically permit the Commission to impose conditions on a telecommunications provider’s operations in New Hampshire, but the Commission has done so when it has determined those conditions to be for the public good.

New Hampshire law authorizes the Commission to grant Comcast Phone’s CLEC-10 Application only if it is for the public good, “and not otherwise”. *See* RSA 374:26. Specifically, RSA 374:26 precludes the commencement of service unless, “after due hearing,”

the Commission finds “that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good . . . *and [the Commission] may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest.*” RSA 374:26 (emphasis added). *See also* Order Approving Settlement Agreement with Conditions, Order No. 24,823, DT 07-011, Verizon New England et al., February 25, 2008 (Order granting FairPoint Communications, Inc. authority to operate as a telecommunications carrier in New Hampshire subject to a multitude of conditions, including, among other things, a requirement that FairPoint not reduce or eliminate its workforce at its call center without Commission approval) and Order Approving Settlement Agreement, Order No. 24,727, DT 06-169, IDT America, Corp. and MetroCast Cablevision of New Hampshire, LLC, January 26, 2007, at ps. 4-6 (Commission approving of settlement agreement and imposing conditions on the proposed business relationship between IDT America, Corp. and MetroCast Cablevision of New Hampshire, LLC, related to the provision of “IP-based cable telephony”).

Ms. Wimer’s proposal in her pre-filed testimony offers a reasonable and appropriate compromise. If adopted by the Commission, Comcast Phone would be permitted to implement its plan as represented to the Commission. The Commission then would initiate a comprehensive docket to address the regulatory framework applicable to Comcast Phone and Comcast IP’s VoIP product and level the playing field to promote free and fair competition. Comcast Phone’s entry into the TDS Companies’ market would not be delayed, and also would not be so unrestricted as to cause harm to the public interest before the Commission could take steps to avoid such adverse conditions. Thus, the RLEC Representatives believe that such conditions are not a matter of enforcement as suggested by Comcast Phone, but conditions

necessary for the public good in the event the Commission decides to approve the CLEC-10 Application and well within the Commission's authority to impose upon Comcast Phone.

CONCLUSION

The RLEC Representatives maintain that Comcast Phone has failed to meet its burden of proving that its expansion into the TDS Companies' service territory as proposed within the CLEC-10 Application is for the "public good" and respectfully requests that the Commission deny the application or, in the alternative, limit approval of the CLEC-10 Application as explained by Ms. Wimer in her pre-filed testimony.

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Respectfully submitted,

NEW HAMPSHIRE TELEPHONE
ASSOCIATION

MERRIMACK COUNTY TELEPHONE
COMPANY

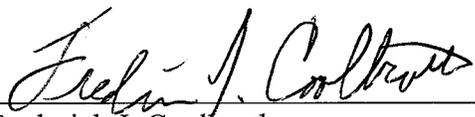
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Dated: October 10, 2008

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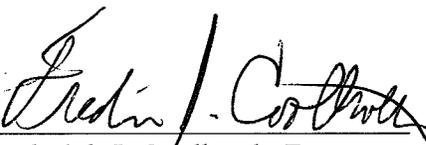
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CERTIFICATE OF SERVICE

I hereby certify that a PDF copy of the foregoing Initial Brief was forwarded this day to
the parties by electronic mail.

Dated: October 10, 2008

By:



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