

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

RE: Comcast Phone of New Hampshire, LLC)
Request for Authority) Docket No. DT 08-013

**REPLY BRIEF
OF
UNION TELEPHONE COMPANY**

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INTRODUCTION AND SUMMARY

The Initial Briefs in this case reflect the fact that the evidence in this case is insufficient for the Commission to make the findings necessary to grant the requested authority. As discussed in the Union Initial brief, the law requires the Commission to make findings on whether granting the requested authority to Comcast is in “the public good” based on evidence on “the interests of competition” and six additional factors. Those findings must be based upon the evidence before the Commission.

The Comcast Initial Brief mischaracterizes aspects of this case, asks the Commission to grant authority without meeting these basic requirements of New Hampshire law, and misstates the burden of proof. The TDS and NHTA Initial Brief shows the lack of fairness to the incumbent ILEC if the authority is granted under the current state regulatory approaches. These aspects of those briefs provide additional support for why the Commission must, as a matter of law, deny the requested authority.

I. THE COMCAST BRIEF MISCHARACTERIZES THIS PROCEEDING

In several instances the Comcast Initial Brief mischaracterizes the nature of this proceeding. For example, Comcast refers to the case as an “unprecedented proceeding” – presumably relying on prior CLEC cases in the Bell Operating Company territory in which there was no hearing. Comcast Initial Brief, p. 2. The decisions by other parties not to pursue hearings on CLEC authority proceedings involving the Bell Operating Company territory are not relevant. One also cannot reasonably assume, as Comcast seems to infer, that the facts in a small ILEC territory are the same as in the Bell Operating Company territory. Hearings before this Commission regarding the “public good” and findings based upon evidence as required by law are not new or

unprecedented. *See e.g. Parker-Young Co. v. State*, 83 N.H. 551, 560, 145 A. 786, 791 (1929) (“The public, as well as the parties, is entitled to a finding of the public good on a hearing without error of law”.)

The factors the Commission is required to consider are not based on an arcane statute, but those that apply after this year’s revisions to the relevant statutes. 2008 N.H. Laws 350. According to Comcast – those revisions “removed the last vestige of restrictive entry in New Hampshire”. Comcast’s first Reply Brief, July 14, 2008, p.3. Comcast should not now be heard to argue that following the requirements of that law in this case “enables barriers to entry”. Comcast Initial Brief, at 8.

Comcast also appears to argue that the parties’ agreements to certain procedural efficiencies diminish the substantive dispute in this case. Comcast Brief, p. 2. Comcast even claims that there is “no genuine dispute” on the ultimate conclusion upon which the decision must be based -- whether the granting of the application is “in the public good”. *Id.* That is simply false. That dispute is why the Commission has this case before it. Intervenors support for efficient processes at the Commission in no way limits the dispute herein and does not alter the legal requirements that apply to the Commission’s findings of fact and decision rendered on Comcast’s requested authority.

II. COMCAST CANNOT SUBSTITUTE UNSUPPORTED CLAIMS FOR EVIDENCE ON THE FACTORS IN THE STATUTE

A. Comcast’s Claims Regarding the Incumbents’ Opportunity to Earn a Reasonable Rate of Return Have No Basis in Evidence

The Comcast Initial Brief makes statements regarding the statutory factor that requires consideration of “the incumbent utility’s opportunity to realize a reasonable

return on its investment.” Those statements are not supported by evidence and must be rejected.

Comcast claims that “Verizon and now FairPoint Communications have faced competition for many years while maintaining the ability to earn a reasonable return on their investment”. Comcast Initial Brief, p. 10. Comcast then makes the statement that “[t]here is no reason to expect that the TDS companies will not similarly be able to continue earning a reasonable return on their investment, even with competition from Comcast” *Id.*

There is no evidence in this case on the earnings of Verizon or Fairpoint in New Hampshire or on their opportunity to earn reasonable returns. There is no evidence on whether the TDS companies’ situation is like that of Verizon or FairPoint, nor is there any evidence on their ability to earn a reasonable rate of return upon the grant of the Comcast application. One cannot simply assume these facts – evidence is required. Thus, the Commission cannot make findings based on those Comcast Initial Brief statements and should simply disregard those statements.

The New York experience shows the error of the Comcast suggestion of making assumptions, rather than using evidence, to address this issue. In New York, the Commission considered data on ILEC earnings in light of competition and found Verizon earning a *negative* 0.24% return on equity on its New York regulated operations in 2006¹. It also found that the six TDS companies there were earning returns on equity on New York regulated operations ranging from *negative* 5.43 % to a *negative* 10.70%².

¹ NY PSC Case 07-C-0349, In the Matter of Examining a Framework For Regulatory Reform, Order Adopting Framework, Appendix D (March 4, 2008).

² *Id.*

Thus, Comcast’s attempt to make an argument for a finding on the “opportunity to earn” factor must be rejected as there simply is no evidence in the record on this factor. The Commission should look to the investigation in nearby New York as an additional policy basis for rejecting the petition on the ‘opportunity to earn’ factor.

B. Comcast’s Claims Regarding the Universal Service and the Carrier of Last Resort Factors also Have No Basis in Evidence

The Comcast Initial Brief makes the claim that universal service support is “ample”. However, the evidence before the Commission includes no analysis or basis to show how the amount of support is “ample”. More importantly, there is no evidence or explanation on how granting the requested authority would actually impact universal service or carrier of last resort obligations in the proposed service territory. The Comcast request that the Commission grant the requested authority while not having evidence on or adequately addressing these statutory factors must, as a matter of law, be rejected.

III. COMCAST MISTATES THE BURDEN OF PROOF IN THIS CASE

Comcast errs in claiming that other parties carry the burden of proof in this proceeding, citing to Commission rule Puc 431.02. Comcast Initial Brief, at 4. That rule does not address the burden of proof in this proceeding. Instead, as addressed in Union’s Initial Brief, Commission rules (Puc 203.25³) and application of traditional rules of evidence places the burden of proof on the Petitioner. The Commission typically describes this as requiring petitioner to meet its burden by a “preponderance of evidence”. *See e.g. Re: Verizon New England*, 264 P.U.R.4th 185, NH PUC Order No.

³ Union’s Initial Brief contained a typographical error in citing commission rule 203.05 on burden of rather than 203.25. Union’s undersigned counsel apologizes for that error.

24,823, at p.38 (February 23, 2008). Comcast's failure to present evidence on factors that the law requires the Commission to address requires denial of the requested authority.

IV. THE REQUIREMENT OF FAIRNESS IS ALSO NOT SUPPORTED BY THE EVIDENCE IN THIS CASE.

The Initial Brief submitted by TDS and NHTA discusses the evidence related to the fairness factor required by RSA 374:22-g and "the inherent right" to "free and fair competition" required by Part II, Article 83 of the New Hampshire State Constitution. While both the constitutional and statutory requirements of fairness are in the context of policies that support competition, both also explicitly require fairness. NHTA and the TDS companies presented evidence showing the unfairness of the disparate regulatory treatment of the services associated with the Petitioner versus the treatment of services associated with the incumbents. Testimony of Wimer, pp. 7-12.

The facts around this highly disparate regulatory treatment do not appear to be in dispute. As discussed in the NHTA and TDS Initial brief, it disadvantages the incumbent utilities when trying to compete. TDS and NHTA Initial Brief, p. 10. Comcast has presented no evidence and makes no reasonable argument that this disparate regulatory treatment results in competition that is fair. Instead, Comcast claims the disparate treatment is irrelevant because it is based on prior Commission decisions. Comcast Initial Brief, p. 8.

Evidence that goes to the statutory and constitutional requirements of fairness is relevant and must be considered regardless of the source of the unfairness. On the record before the Commission, it is impossible to find fairness in the competition resulting from

the Comcast proposal. This provides an additional basis for why the Commission, as a matter of law, may not grant the requested relief.

CONCLUSION

This case involves a request for authority to provide competitive landline telecommunications services – including the requirements for a residential VoIP telephone service. The evidence before the Commission fails to provide an adequate basis for findings of fact on certain of the factors the Commission must address in order to make a finding on the public good. Thus, the Commission must deny the requested authority.

Respectfully submitted,

**UNION TELEPHONE COMPANY d/b/a
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