STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 08-013

Comcast Phone of New Hampshire, LLC

Application for Authority to Service Customers
in the TDS Service Territories

**Joint Motion for Rehearing and/or Reconsideration by
New Hampshire Telephone Association,
Merrimack County Telephone Company
Kearsarge Telephone Company and
Wilton Telephone Company, Inc.**

NOW COME the New Hampshire Telephone Association ("NHTA"), Merrimack County Telephone Company ("MCT"), Kearsarge Telephone Company ("KTC") and Wilton Telephone Company, Inc. ("WTC", and referred to hereinafter collectively with the NHTA, KTC and MCT as the "RLEC Representatives") and hereby respectfully request that the New Hampshire Public Utilities Commission (the "Commission") reconsider its order number 24,938, dated February 6, 2009 (the "Order") and/or grant a rehearing in docket DT 08-013 (this "Docket"). In support of their motion, the RLEC Representatives hereby state as follows.

INTRODUCTION

This Docket arose out of a request filed by Comcast Phone of New Hampshire, LLC ("Comcast Phone") purportedly to provide telecommunications services and to conduct business as a competitive local exchange carrier (a "CLEC") in the service territories of KTC, MCT and

WTC.[1] In the Order, the Commission granted the request and found, among other things, "that granting Comcast [Phone] authorization to operate in the TDS Companies service territories is for the public good." Order at 23. The Commission also stated that "[t]he TDS Companies are...required to provide interconnection to Comcast [Phone]" and held that "[i]nterconnection consists of the physical exchange of traffic between carriers" *Id.* at 22.

APPLICABLE LAW AND STANDARD OF REVIEW

The applicable law and standard of review for this Motion are well established. The governing statute, RSA 541:3, states:

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings. *See Dumais v. State*, 118 N.H. 309, 312 (1978). *See also Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).

Any motion for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. As explained

[1] KTC, MCT and WTC (collectively sometimes referred to in this Motion as the "TDS Companies") are indirect wholly owned subsidiaries of Telephone and Data Systems, Inc. WTC is participating in this motion only as it relates to the issues contained in Section III of this Motion and the related request for rehearing and/or reconsideration.

below, the Commission committed reversible errors in granting Comcast Phone's request to provide service and with respect to its requirement that the TDS Companies must interconnect with Comcast Phone. The RLEC Representatives respectfully submit that the correct action to be taken in response to this Motion is for the Commission to reconsider its Order and to grant a rehearing.

ARGUMENT

I. Comcast Phone Has Not Demonstrated Under New Hampshire Law That It Will Provide Telephone Service "for the Public".

In order to engage in business as a telephone utility subject to the jurisdiction of this Commission, the petitioner must demonstrate that it will provide services that meet the definition of a "public utility" as set forth in RSA 362:2, i.e., that it proposes to own, operate or manage "plant or equipment or any part of the same for the conveyance of telephone or telegraph messages ... for the public." *Id.* Without question, the primary focus of Comcast Corporation is to use CLEC status of its subsidiary Comcast Phone to facilitate another Comcast Corporation subsidiary's provision of Comcast Digital Voice ("CDV") service, which Comcast Phone claims is an unregulated "IP enabled" voice service. *See* Direct Testimony of David J. Kowolenko ("Kowolenko Direct"), at p. 3.17 - 4.2; *see also* Direct Testimony of Michael D. Pelcovits ("Pelcovits Direct"). at p. 4.9-15. The RLEC Representatives maintain that these alleged offerings are merely a pretext to enable Comcast Phone to obtain interconnection with the public switched telephone network ("PSTN") so that its affiliate, Comcast IP Phone II, LLC ("Comcast IP"), can provide CDV service on an unregulated basis. The Order is unlawful and unreasonable in that, under the circumstances of this case, it did not require any demonstration through business plans or otherwise that Comcast Phone actually intends to serve the public.

The grant of permission to commence business in New Hampshire requires a determination that such grant will be consistent with the public good. RSA 374:22-g; RSA 374:26. The general public good standard in New Hampshire was set out nearly a century ago in *Grafton County Electric Light & Power Company v. State*, 77 N.H. 539 (1915) and includes a requirement that "the proposed action must be one not forbidden by law, and that it must be a thing reasonable to be permitted under all the circumstances of the case." *Grafton County*, at 540 (emphasis added). A determination of public good is not a mere "check the box" analysis. *Appeal of Easton*, 125 N.H. 205, 213 (1984) (in considering a utility financing, the Commission "has a duty to determine whether, under all the circumstances, the financing is in the public good - a determination which includes considerations beyond the terms of the proposed borrowing"). In addition, the New Hampshire Supreme Court has addressed the issue of "service to the public" in determining status as a common carrier or public utility under New Hampshire law. In Appeal of Zimmerman, 141 N.H. 605 (1997), the Court held that:

> An enterprise is necessarily private if the service provider has a relationship with the service recipient, apart from the service provision itself, that is sufficiently discrete as to distinguish the recipient from other members of the relevant public; this is the "discrimination" that separates public utilities from private.

Zimmerman, at 609.

Comcast Phone says that it is proposing to resell business local exchange service at prices well above those offered by KTC and MCT and to provide a specialized "schools and libraries" service for which it has no prices or customers. First, it says that it offers "local business service." However, this so-called service is simply a resale offering of the business service offered by KTC and MCT priced at a level far above the rates at which the same services are sold by KTC and MCT. While Mr. Kowolenko provided testimony that Comcast Phone has been providing CLEC services in the service territory now owned by FairPoint Communications,

Inc. ("FairPoint") since 1998 (*see* Kowolenko Direct at ps. 4.19 - 5.2), he offered no evidence that Comcast Phone secured customers for the service it now claims it will offer in the TDS Companies' service territories. The RLEC Representatives therefore respectfully submit that such an offering of Comcast Phone's local business service is not evidence of a bona fide offering of service to the public.

Comcast Phone also relies on its proposed "Schools and Libraries Service," which it claims to offer to "e-rate eligible" institutions. This service purports to be a high-speed data service that uses point to point T1 circuits to connect local area networks across the customer's physical locations. The service is available only to primary and secondary educational institutions, corresponding municipal libraries and other "e-rate eligible" institutions. It is not available for resale. The service also provides for Point-to-Point Service to connect schools' and libraries' physically distributed locations as if they were on the same local area network. The service is provided between designated customer locations within a metropolitan area. Finally, the service purports to provide a Channelized Exchange Service (i.e., a channelized T1 service) that offers to e-rate qualifying institutions local and long distance dialing capability through the PSTN, along with various features associated with local and toll service calling. This service is "subject to facility and system availability." *See* Comcast Phone Supplement to CLEC-10 Application, May 29, 2008, at p. 3 *See also* Comcast Phone's Rate Schedule for Schools and Libraries Service, filed with the Commission on or about December 8, 2008, effective December 9, 2008.

The Network Services and Point-to-Point Service for schools and libraries simply connect customer locations and do not require any interconnection arrangements with the TDS Companies. Channelized Exchange Service does involve traffic on the PSTN. However, it is

not known whether Comcast Phone is actually providing any such service, or will ever provide any Channelized Exchange Service, or whether this service (if provided) will be VoIP based. In any event, Comcast Phone's claim that it is offering Channelized Exchange Service in New Hampshire is suspect because the offering of such service would appear to be inconsistent with Comcast Phone's filings with this Commission and the FCC stating that it planned to discontinue local and toll services in the state of New Hampshire. *See* FCC Public Notice DA 08-871, April 14, 2008, at p. 2. In addition, as with the local business service, Mr. Kowolenko offered no evidence that Comcast Phone has any customers in FairPoint's service territory for the Schools and Libraries Service.

The Commission did not consider such factors. The failure to consider these factors is unlawful under *Easton*. The circumstances here strongly point to the conclusion that the sole objective of Comcast Corporation is for its Comcast Phone affiliate to obtain interconnection so that it can provide private carriage of telecommunications to Comcast IP. The factors demonstrate that Comcast Phone does not or will not offer bona fide services to the public and, therefore, it is a private carrier pursuant to the test established under *Zimmerman*. The RLEC Representatives therefore request that the Commission reconsider its Order on these factors alone and grant a rehearing.

II. The Order Is Unlawful and Unreasonable in that It Fails to Consider whether the Proposed Conduct Would Be Contrary to Law.

As noted above, Comcast Corporation's objective in this case is to arrange for interconnection to the PSTN so that its Comcast IP affiliate can provide telephone service free from any regulation by this Commission. If the CDV service is telephone service under New Hampshire law, then Comcast IP is required to seek this Commission's approval before offering

it to the public under RSA 374:22 and RSA 374:22-g, and the failure to do so is unlawful. Under these statutes, no service provider may provide telephone service absent having first obtained this Commission's approval. By failing to initiate an investigation into the regulatory treatment of the real service that Comcast intends to provide, CDV service, the Commission has failed to undertake a most fundamental inquiry for determining the public good, i.e., whether the proposed conduct is "forbidden by law." *Grafton County, supra.*

For example, assuming this Commission undertakes an investigation into the CDV service and determines that such service constitutes a telecommunications service under federal and New Hampshire law[2], then Comcast IP already would be providing a regulated service absent Commission approval and Comcast Phone would be facilitating such service absent Commission approval. Yet the statutory requirement can not be more clear. RSA 374:22 states, in relevant part, that:

> No person or business entity shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.

Accordingly, the RLEC Representatives submit that the Order is unlawful and unreasonable in that the Commission failed to review the regulatory status of the CDV service. Given Comcast Phone's blatant marketing of such service (*see ex.* *http://www.comcast.com/Corporate/Learn/DigitalVoice/digitalvoice.html*) and Mr. Kowolenko's direct testimony on the issue, it is abundantly clear that the CDV service will be offered in the TDS Companies' service territory.

[2] The Commission noted in Order number 24,887 (at page 6), that "[t]he question of whether Comcast IP's new digital voice service is a regulated telephone service is an important regulatory issue."

Such conduct would not be consistent with RSA 374:22 and would not be consistent with the Supreme Court's holding in *Grafton County*.[3]

III. 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.

In Subsection G of the Order, at pages 22-23, the Commission ordered the TDS Companies to interconnect with Comcast Phone and described interconnection as the physical exchange of traffic between carriers. The Order further held that these carriers will recover any costs incurred in interconnecting with Comcast Phone through fees implemented in a negotiated interconnection agreement. *See* Order at p. 23. Yet Comcast Phone's CLEC-10 application did not request an order concerning interconnection requirements. None of the parties had advance notice that such matters were at issue in this Docket or that the Commission would make such determinations. Moreover, the record contains no evidence to support such a factual finding.

Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution, N.H. CONST. pt. I, art. 15, guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner. *See Appeal of Concord Steam Corporation,* 130 N.H. 422, 428, 543 A.2d 905, 908-09 (1988) citing *Appeal of Portsmouth Trust Co.,* 120 N.H. 753, 756, 758, 423 A.2d 603, 605-06 (1980). A fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence. *Id. See also City of Claremont v. Truell,* 126 N.H. 30, 35, 489 A.2d 581, 585 (1985);

[3] The RLEC Representatives note that they have requested on multiple occasions that the Commission undertake such an analysis. *See* RLEC Representatives Brief at ps. 11-12 (September 29, 2008); Pre-filed Testimony of Ms. Valerie Wimer at ps. 15.12-21 - 16.1-7; and NHTA's Objection to Order *Nisi* and Request for Hearing, April 21, 2008, at ps. 6-7.

Sununu v. Clamshell Alliance, 122 N.H. 668, 672, 448 A.2d 431, 434 (1982). While due process in administrative proceedings is a flexible standard, the New Hampshire Supreme Court long has recognized that the Commission has important quasi-judicial duties and, therefore, has required the Commission's "meticulous compliance" with the constitutional mandate where the agency acts in its adjudicative capacity, implicating private rights. *Appeal of Public Serv. Co. of N.H.,* 122 N.H. 1062, 1073, 454 A.2d 435, 442 (1982).

The Commission's due process obligation is apparent, moreover, in the statute delineating the agency's broad investigative authority and in the provisions of the Administrative Procedure Act. *See Appeal of Concord Steam,* 130 N.H. at 428 citing RSA 365:5 and :19, 378:5, and RSA 541-A:16, 18. Indeed, RSA 541-A:31, III and IV are clear that the Commission must provide "[a] short and plain statement of the issues involved" and "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all issues involved." *Id.*

In the present case, the Commission provided no advance notice that it would determine issues with respect to any requirement that any of the carriers involved in this Docket must interconnect with Comcast Phone. In the Order, the Commission summarized that matters at issue in stating that "...the remaining unresolved issue to be decided in this docket [is] whether Comcast Phone's CLEC application is consistent with the public good..." *See* Order at p. 3. The Commission used nearly identical language in its procedural order (number 24,887) wherein it advised that it would schedule a hearing. *See* Procedural Order 24,887, issued on August 18, 2008 (Commission noting that it would schedule a hearing to consider "evidence by Comcast [Phone] and other parties to consider whether a grant of franchise authority...is for the public good"). Nothing in any Commission order or submission by Comcast stated that interconnection obligations would be adjudicated in this Docket.

In addition, the Commission concluded that "[i]nterconnection consists of the physical exchange of traffic between carriers." Order at p. 22; *see also* Order at p. 20 (noting that Section 251 of the Act (hereinafter defined) requires interconnection). As with the statement that the TDS Companies are required to interconnect with Comcast Phone, there was no advance notice to the parties to this Docket that the definition of "interconnection" was at issue. Furthermore, the RLEC Representatives submit that the Commission's description of "interconnection" is not consistent with applicable law. Section 251 of Communications Act of 1934, as amended (the "Act"), provides in part that a telecommunications carrier has the duty to interconnect with the facilities and equipment of other telecommunications carriers. This provision refers only to interconnection between facilities and equipment, and not to the provision of service. *AT&T Corporation v. Federal Communications Commission,* 317 F.3d 227, 234-35 (D.C. Cir. 2003) citing *Competitive Telecommunications Ass'n V. FCC,* 117 F.3d 1068, 1072 (8th Cir. 1997). The Federal Communication Commission (the "FCC") has been clear, the term "interconnection" and the phrase "exchange of traffic" have distinct meanings under the Act. The FCC has ruled that:

> In the *Local Competition Order*, we specifically drew a distinction between "interconnection" and "transport and termination," and concluded that the term "interconnection," as used in section 251(c)(2),[4] does not include the duty to transport and terminate traffic.[5] Accordingly, section 51.5 of our rules specifically defines "interconnection" as "the linking of two networks for the mutual exchange of traffic,"

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[4] 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point and on rates, terms, and conditions that are just, reasonable, and nondiscriminatory).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15590, ¶ 176 (1996) (*Local Competition Order*), *aff'd in relevant part, Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997)(*CompTel v. FCC*); *aff'd in part, vacated in part, Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *cert. granted, AT&T Corp. v. Iowa Utilities Bd.*, 522 U.S. 1089 (1998); *aff'd in part, reversed in part, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), *opinion after remand, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, 14 FCC Rcd 5263 (1999) (subsequent history omitted).

and states that this term "does not include the transport and termination of traffic."[6] *In the Matter of Total Tel. Communications v. AT&T Corporation,* 16 F.C.C.R. 5726, at ¶ 23 (March 13, 2001) affirmed in relevant part at *AT&T,* 317 F.3d. at 234-35 (D.C. Circuit Court holding in part that Section 252 of the Act "...contemplates the very distinction between physical linkage and exchange of traffic...").

Thus, the Commission's statement that interconnection requires the exchange of traffic under the Act is not correct. Further, such matters were not noticed as issues in this Docket in violation of New Hampshire law. The Order therefore is unjust and unreasonable and the RLEC Representatives should be granted a rehearing.

IV. The Order Is Unlawful and Unreasonable In That the Commission Improperly Interpreted the Law Regarding Barriers to Entry.

As discussed above, the Order produced a result that is manifestly unfair to the TDS Companies and detrimental to the public good. The RLEC Representatives submit, however, that the Commission has the authority and the tools to correct this imbalance. Section 253 of the Act contains this authority as it addresses barriers to entry.

The Order referenced Sections 251 and 253 of the Act liberally, but portrayed the statutory provisions as an absolute and unconditional prohibition to any action that could pose a barrier to a prospective competitor. For example, the Commission held that "[t]he 1996 Telecom Act prohibits states from taking *any* actions which create barriers to competitive entry into the telecommunications markets." Order at 16 (emphasis supplied). "[S]mall ILECs in New Hampshire must not erect barriers to competitive entry and the CLEC approval process should

[6] 47 C.F.R. § 51.5.

not become a barrier to competitive entry." *Id.* at 20. "[T]he 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition." *Id.* at 20-21

This interpretation is much too broad. While it is true that subsection (a) of Section 253 provides that 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," it still provides safeguards to ensure full and fair competition. A fuller reading of Section 253 reveals that it is not considered an entry barrier for a state commission to create a level playing field in rural markets. Subsection 253(f) provides that:

> [i]t shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.

Thus, the Commission is empowered to insist that a carrier seeking to enter a rural market must be prepared to truly compete in that market, rather than selectively skim customers from the incumbent carrier of last resort. According to the Act, this does not constitute an entry barrier. The Order does not consider fully the implications of Sections 251 and 253 of the Act. Such an interpretation of the Act is unlawful and unreasonable. The Commission's failure to consider aspects of the Act that allow for the implementation of conditions which would promote level and fair competition warrants a reconsideration of the Order.

V. The Order Is Unlawful and Unreasonable In That it Violates RSA 374:22-g In Several Respects.

In determining whether it serves the public good to permit a telecommunications carrier to enter an existing service territory, RSA 374:22-g provides that:

> 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.

RSA 372:22-g(II) (emphasis supplied).

It is true, as the Order noted, that competitive markers "are favored by both federal and state statutes, [and] generally encourage greater efficiency, lower prices and more consumer choice." Order at 18. However, as RSA 374:22-g demonstrates, the New Hampshire legislature has recognized that competition is not an absolute good, and that other considerations come into play in determining whether and how competition can ensure benefits to *all* subscribers. Fairness is the first factor listed. By failing to commence an investigation with regard to the regulatory treatment of CDV service, the Commission failed to consider a factor at the heart of any determination of public good: whether the proposed action is lawful. In addition, by not considering all of the elements of Sections 251 and 253 of the Act, the Commission did not fully evaluate the "fairness" requirement under RSA 372:22-g(II).

B. Competition and Economic efficiency

"Economic efficiency" is a vague term that the Commission undoubtedly has invoked in multiple Applications for Authority, but has never defined in the context of local exchange service, nor has it developed a legal test. It is not clear whether the economic efficiency factor is

a theoretical aspiration or a measurable state, or if it applies to the economic efficiency of the incumbent, or of the applicant, or of the overall market as a result of the applicant's entry. As a result of this ambiguity, the parties to this Docket did not know in advance what factors the Commission would consider under this prong of the statute.

As the Order noted, the record in this proceeding establishes that Comcast's entry in the TDS markets will have an adverse affect on their economic efficiency. Order at 20. The Order minimized this concern by asserting that the "only" thing that distinguishes the Comcast application from the numerous others is that "the ILEC whose service territory is being entered is subject to the rural exemption under the federal statute." *Id.* However, this is a huge distinction in the case of rural carriers which are afforded multiple statutory protections.

The Order contains little to no support for the conclusion that "one of the ways to achieve economic efficiency is by eliminating barriers to entry." *Id.* However, it is not clear that there is any relationship, direct or indirect, between these two concepts, and the Order offered no elucidation. There is no evidence in the record and no citation to either precedent or secondary authority to support it. At best, it can be deduced that reduced barriers to entry *may* tend to encourage competition, but it does not follow that this will necessarily be free and fair competition, nor that it will lead to economic efficiency, however that is defined.

The Commission further determined that it found "...no indication in the...Act that ILECs subject to the rural exemption are protected from competitive entry." Order at p. 20. As noted above, however, the Order fails to consider Section 253(f) of the Act or its reference to Section 214(e) of the Act. The Order's analysis of competition and economic efficiency digressed into discussions of entry barriers, interconnection, rural exemptions, and economic cost. It did not,

however, address the issue of economic efficiency as it concerned the Comcast Phone application. The Order therefore has produced an unlawful and unreasonable result.

C. USF, Carrier of Last Resort and Rate of Return Issues

In the unsupported conclusions regarding the ability of the TDS Companies to recover lost revenues from the federal universal service fund, the Order demonstrated a misunderstanding of how the USF program works. For example, it asserted that "under the current federal statutory scheme, ILECs are compensated for [their carrier of last resort] obligation through the universal service fund (USF)." Order at 21. "USF support to the ILEC continues even in a competitive market and provides protection against reduced return on investment." *Id.* at 22. With no support in the record, these assertions assumed that federal USF ensures 100% recovery of costs not recovered through regular rates. This is not the case, however. As shown in Comcast Phone's testimony, the TDS Companies receive no High Cost Loop Support in New Hampshire. Furthermore, although the TDS Companies receive Interstate Common Line Support, this only recovers the costs of the *interstate* portion of the loop. Consequently, every line that MCT and KTC loses represents a loss of revenue that can not be recovered through external means.

It clearly is Comcast Corporation's intent and plan to have Comcast Phone and Comcast IP offer local exchange service outside of the Commission's jurisdiction and not be subject to the obligations and burdens of a regulated carrier. Consequently, the Comcast based entities will be able to offer comparable services at a lower cost while also selectively targeting the lowest-cost subscriber base, leaving KTC and MCT to continue to serve higher-cost subscribers. With fewer revenues to support the fixed costs of an unchanging service obligation, KTC and MCT may face the choices of losing money or compound their competitive disadvantage by raising rates.

Nevertheless, the Order determined that no judgment can be made regarding whether MCT and KTC will be able to earn a reasonable return, conceding that "[a]t this point, the analysis is, at best, speculative." Order at 21. Yet despite this uncertainty, the Commission ruled in favor of Comcast Phone on the issue, even though it was Comcast Phone that had the burden of proof – not by mere "speculation," but by a "preponderance of the evidence." *Id.* at 18. The Order, in effect, shifted the burden to MCT and KTC. Rather than unlawfully shift the burden proof, the Order should, at the very least, have left this factor undecided. To have done otherwise is unreasonable, considering the lack of evidence and Comcast Phone's failure to meet its burden of proof.

CONCLUSION

The Order was unlawful and unreasonable on a number of fronts. It did not apply the appropriate analysis of the public good. It decided issues that were not properly before the Commission and on which the parties were not heard. It overlooked facts regarding the unfairness of the Application, it reversed the burden of proof, and it drew conclusions about the economic impact to KTC and MCT not supported by the evidence.

WHEREFORE, the RLEC Representatives hereby respectfully request that this Commission:

A. Grant this Motion for Rehearing and/or Reconsideration in order to address the issues raised herein; and

B. Suspend the Order pending a full resolution and appeal of the issues raised herein.

Respectfully submitted,

NEW HAMPSHIRE TELEPHONE ASSOCIATION
MERRIMACK COUNTY TELEPHONE COMPANY
KEARSARGE TELEPHONE COMPANY
WILTON TELEPHONE COMPANY, INC.

By Their Attorneys,

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Dated: March 6, 2009

By: _____

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CERTIFICATE OF SERVICE

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

Dated: March 6, 2009

By: _____

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