STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Petition by Certain Rural Telephone Companies Regarding CLEC Registrations within Their Exchanges	)))	Docket No. DT 10-183

INITIAL BRIEF OF NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

Introduction and Summary of Argument

The New England Cable and Telecommunications Association, Inc. ("NECTA") appreciates the opportunity to participate in this Public Utilities Commission ("Commission" or "PUC") investigation on remand from the New Hampshire Supreme Court in Appeal of Union Telephone Company d/b/a Union Communications, 160 N.H. 309 (May 20, 2010) ("Union Appeal") of the degree to which the certification process for competitive local exchange carriers ("CLECs") in territories served by rural incumbent local exchange carriers ("rural ILECs" or "RLECs") is preempted by federal law at 47 U.S.C. § 253. See Union Appeal, 160 N.H. at 323 (ruling that Union has no constitutional right to a hearing on registration requests in RLEC territories but interpreting RSA 374:22-g, RSA 374:26 and other state statutes to require a hearing on such registration requests, absent consent of all parties, and remanding such requirement for consideration of possible federal preemption).

NECTA has participated in this investigation by intervening as a party; negotiating and signing the joint October 4, 2010 Stipulation as to PUC

certification procedures in RLEC areas ("Joint Stipulation"); propounding and responding to discovery requests and submitting October 22, 2010 Initial Pre-Filed Testimony and November 19, 2010 Rebuttal Pre-Filed Testimony of its witness, Dr. Michael D. Pelcovits ("NECTA Initial Testimony" and "NECTA Rebuttal Testimony," respectively, and collectively the "Pelcovits Testimony"). Based on the record in these proceedings, especially the Pelcovits Testimony, NECTA requests that the Commission find and rule as follows:

First, the Commission should find that the multi-stage, multi-factor adjudicative hearing requirement applicable to each and every CLEC certification request in RLEC service areas, unless voluntarily waived by all parties (including the affected RLEC), establishes a significantly burdensome and costly entry process. See Joint Stipulation passim (highlighting adjudicative hearing procedures that may include intervention pleadings, procedural conferences, discovery, pre-filed testimony, evidentiary hearings, one or more briefs and a final Commission determination). Unique language in RSA 374:22-g has been interpreted in the Union Appeal to require the Commission to hold a hearing in which RLECs may introduce evidence on the potential impacts of CLEC entry on their own return on investment and on the other factors listed in Section 374:22-g. See October 22, 2010 Initial Testimony of Douglas Meredith for RLECs ("RLEC Initial Testimony"), p. 11 (acknowledging unique nature of New Hampshire statute). This requirement significantly increases the potential burdens for CLECs, as RLEC-derived evidence regarding alleged adverse impacts on their businesses will necessitate discovery, evidence development

and testimony by the CLECs to respond to RLEC claims. See NECTA Initial Testimony, pp. 6-7, pp. 21-24.

Second, the Commission should find that the state law adjudicative process required by the Union Appeal, on its own and in conjunction with other entry-related investments and requirements, constitutes a significant barrier to entry into the rural exchanges in New Hampshire and is, therefore, preempted under federal law. See NECTA Initial Testimony, p. 30. The amount of time and procedure associated with adjudication of a case that must include a detailed evaluation of the factors enumerated in Section 374:22-g would result in very high costs to CLEC applicants relative to prospective gains from entering the limited in size markets of rural ILECs. Id. The Commission's recent rural entry proceedings make clear that RLECs are prepared, willing and incented to expend significant regulatory resources to delay or prevent competition under the guise of statutory rights, causing delays of more than a year and frustration to CLEC entry efforts. See id., pp. 21 and 28 (discussing Commission proceedings in dockets 09-048 and 08-013, respectively). Furthermore, in their testimony and discovery responses, the RLECs have supported CLEC entry requirements that would impose substantial "sunk costs" and burdens on entering CLECs, including a possible requirement that CLECs must serve entire RLEC service areas, including parts of the service areas in which CLECs do not already have facilities, and mandating that CLECs obtain Eligible Telecommunications Carrier ("ETC") status under federal law. See RLEC Initial Testimony, pp. 14-15 and RLEC Response to NECTA 2-9(a) (stating RLEC position that it would be appropriate to

require a newly entering CLEC to provide service throughout an RLEC's entire service area, even if the CLEC would incur higher costs of providing service to this defined geographic area).

Finally, NECTA recommends that the Commission henceforth review the qualifications of CLEC applicants in rural areas by using the non-adjudicative Verizon/FairPoint application review process that has operated successfully in most of New Hampshire since 2005. See PUC 431; see also NECTA Rebuttal Testimony, pp. 4-8 (discussing similar non-adjudicatory CLEC entry processes in many other states). In any event, CLEC entry should be considered separate and apart from broader regulatory issues that would be more appropriately addressed through RLEC requests for docketed proceedings, petitions for alternative regulation or generic Commission investigations that would not delay competitive entry. The presence of regulatory policy issues associated with the development of competition in rural areas should not be addressed piecemeal in each and every CLEC registration request as it would be duplicative and a waste of resources to consider these issues on a case-by-case basis for each CLEC application and will cause limits on or delays in the availability of new service options for rural customers. See NECTA Rebuttal Testimony, p.14.

Applicable Legal Standards

State or local authority is a federally preempted entry barrier if it would have a significant effect on the ability of a telecommunications provider to compete against an ILEC. Under the plain language of 47 U.S.C. § 253, State

and local authority are preempted when they "may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." (Emphasis added.) In other terms, preemption is applied on those provisions of state or local law that make it more difficult for another carrier to compete in an ILEC-served area.[1]

As further guidance for establishing federal preemption, the New Hampshire Supreme Court endorsed analysis from the Federal Communications Commission ("FCC") and other state jurisdictions.[2] In doing so, the Court cited authority that a law should be deemed to have the "effect of prohibiting" a new entity from providing telecommunications services when it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal or regulatory environment," and that "[a] prohibition does not need to be complete or insurmountable to run afoul of 253(a)."[3] Further, the Court has also acknowledged that a prior hearing requirement is preempted when it "creates substantive and procedural constraint upon [the] ability of [a] potential competitor to provide local exchange services."[4]

---

1 See Union Appeal at 321 citing to In the Matter of American Communications Services, Inc., 14 F.C.C.R. 21579 (1999).

2 Union Appeal at 321.

3 Union Appeal, p. 321 citing to Puerto Rico v. Municipality of Guayanilla, 450 F. 3d 9 (1st Cir. 2006) (emphasis added).

4 Union Appeal, p. 321 citing to Re: Sprint Communications Company LP, No. 6055-NC-103, 2008 WL 2787762 at *8 (Wisconsin Public Service Commission, May 9, 2008) ("Wisconsin Decision"). In the Wisconsin Decision, the Commission there determined that the "imposition of a hearing and its associated proceeding formalities for their duration would have 'the effect of prohibiting' [an] applicant from being a competing provider of the service" and acknowledged the "potential for significant additional delay [ ] resulting from party use of discovery procedures...." Further, the Wisconsin Commission made the legal finding that the state statutory scheme "create[d] a barrier to entry that impedes a competition objective of the FTA, [was] contrary to the

Argument

I. INTRODUCTION

The Pelcovits Testimony presents factual analyses and policy arguments supporting a finding that an adjudicative process under RSA 374:22-g and RSA 374:26, as applied to each and every CLEC registration request in a New Hampshire rural ILEC service territory, is contrary to the public interest in competitive telecommunications alternatives for New Hampshire consumers and constitutes an entry barrier that is preempted pursuant to 47 U.S.C. § 253. Testimony offered by segTel Inc.'s ("segTel's") witness, Kath Mullholand, in her October 22, 2010 Initial Testimony ("segTel Initial Testimony") provides additional support for preemption. The rest of the record contains no apparent grounds demonstrating why the New Hampshire adjudicative hearing requirement, with its unique statutory requirement to consider specific factors affecting the RLEC upon CLEC entry – including its rate of return on investment – should pass legal muster under 47 U.S.C. § 253.

II. THE CURRENT CLEC REGISTRATION PROCESS IN RLEC TERRITORIES IS EXCESSIVELY BURDENSOME TO CLECS

A. The Registration Process for Rural Service Areas Is Burdensome and Time Consuming for CLECs.

The requirement of an adjudicative hearing for each CLEC entry into rural service areas in New Hampshire, unless waived by the consent of all parties, as

---

intent of Congress in the FTA, and [was] not competitively neutral under § 253(b)." Id., p. 3.

required by New Hampshire statutes according to the interpretation adopted in the Union Appeal, creates an extensive and time consuming regulatory process for most, if not all, potential entrants.[5] The RLECs, NECTA, segTel and Commission staff ("Staff") agreed in the Joint Stipulation on the regulatory process required under the Union Appeal for each CLEC application into a rural territory. This process will include all of the following activities unless waived by agreement of all parties or not pursued by the RLEC:

- The filing of a petition by the CLEC to request entry into an RLEC territory.
- Commission issuance of public notice, commonly in the form of a Commission Order of Notice, relative to the CLEC request and the nature of applicable Commission review served on the affected RLECs in each petition.
- Making the affected RLEC a party to the proceedings and assessing petitions to intervene of other interested parties.
- Preparation for and the holding of an initial Commission pre-hearing conference and technical session to decide interventions and determine a schedule for procedural steps.
- The filing of initial and rebuttal testimony by all parties on any relevant factor listed in RSA 374:22-g and other facts material to the CLEC request.
- Discovery on testimony and other evidence offered prior to a public evidentiary hearing.
- Preparation for and the holding of a public evidentiary hearing to review and address evidence submitted for possible inclusion in the record.
- Filing of briefs by all parties and/or requests for findings of fact or law.
- Issuance of an Order by the Commission pursuant to RSA 363:17-b.

---

[5] This discussion assumes a CLEC entry request that does not require unbundling by the RLEC of its network facilities under 47 U.S.C. §§ 251(c) and (f), a process that may require an additional set of Commission procedures. See NECTA Initial Testimony, p. 7.

- The filing of a petition for reconsideration or appeal of an adverse Commission ruling pursuant to RSA 541:1, RSA 541:6 or other applicable appeal statutes.

This extensive regulatory process for a CLEC each time it seeks to enter an RLEC service territory is patently burdensome and time consuming. As a practical matter, it will require extensive written pleadings; involvement of an attorney with knowledge of applicable state and/or Commission substantive and procedural law and, likely, an expert witness with knowledge of ILEC finances and experience in forecasting the impact of competition on an incumbent's volume of business and prices; one or more trips to Concord for the client representatives and witnesses; and delays of many months during the proceedings and eventual Commission ruling. See Joint Stipulation passim.[6] The excessive nature of these requirements and the ability of RLECs to expand the scope of these proceedings into rate case-like dockets are discussed in Section III below. New Hampshire residential and business customers will be disadvantaged if CLECs elect not to compete in New Hampshire rural areas because of the burdensome nature of the entry process. NECTA Initial Testimony, pp. 12, 29-30.

B. The New Hampshire Rural Entry Process is Excessively Burdensome in Comparison to Other Entry Practices.

One way to illustrate the burdensome nature of the required adjudicative process for rural entry in New Hampshire is to contrast it to the streamlined entry

[6] See also segTel Initial Testimony, p. 3 (explaining the additional procedures, time and effort that CLECs without existing cable facilities would need to invest); segTel's Responses to NECTA-SEGTEL 1-1 and 1-2 (projecting lengthy processes for RLEC entry by a non cable provider CLEC whether by employing unbundled network elements or by construction of telecommunication facilities).

procedures available elsewhere in New Hampshire and in nearby states. Tellingly, the longstanding PUC Rule 431 non-adjudicative registration process for entry into FairPoint territories requires only that the CLEC submit a detailed application focusing on its qualifications to serve the requested service territory. See PUC Rule 431. It is reviewed in short order by the Commission without the necessity of a hearing. See Frequently Asked Questions Regarding CLEC Entry on Commission website, available at http://www.puc.nh.gov/Telecom/CLECfaq.pdf (advising that a CLEC "application is reviewed, and, if it is acceptable, the PUC issues a certificate of registration. The registration process takes about four weeks").

Other New England states typically have far more streamlined entry procedures and practices compared to the processes described in the Joint Stipulation. NECTA Rebuttal Testimony, pp. 2-7; cf. RLEC Initial Testimony, pp. 9-10 and RLEC Response to NECTA-RLECS 1-1 (listing states with allegedly burdensome entry review processes but acknowledging that Mr. Meredith had failed to investigate how these requirements were applied in practice). In deciding the merits of this dispute, the Commission should compare the burdensome process for entry into New Hampshire RLEC territories with the far less burdensome, nonadjudicative review processes currently operating in adjoining states such as Massachusetts, Rhode Island and Vermont, as well as in FairPoint areas of New Hampshire itself. See id.

C. The Burden Is Heightened by the Willingness of RLECs to Devote Litigation Resources to Challenge Potential Entrants.

The recent history of efforts to enter rural service areas shows that RLECs understand the competitive threat to their heretofore monopoly or near-monopoly control of their service territories and will devote significant litigation resources to vindicate procedural and legal rights and/or delay or frustrate entry. In short, serious competitors to RLEC businesses can expect to be subjected to all or virtually all of the procedures in the Joint Stipulation and can expect to receive little, if any, relief, from the RSA 374:26 exception that the adjudicative process can be avoided by agreement of all parties, notably including the affected RLEC.

Specifically, the Commission should take administrative notice[7] of the procedures and time lines in the following proceedings:

- The Comcast CLEC certification docket in certain TDS RLEC territories (08-013) took approximately one and a quarter years, from the December 2007 application through the lengthy motion, testimony and briefing process and up to the final February 2009 decision.
- The MetroCast CLEC certification docket in an RLEC territory (08-130) took approximately one and a half years, from the September 2008 filing of the certification request, through the affected RLEC's request for and the Commission's denial of a rehearing and up to the final March 2010 decision of the New Hampshire Supreme Court on appeal that reversed the Commission's Order in part and remanded it for the instant proceeding.

---

[7] See PUC Rule 203.27 (requiring the Commission to take administrative notice of, "[a]ny fact which could be judicially noticed in the courts of New Hampshire"); and see N.H. Evid. Rule 201 (2010) (providing that "[a] court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," and that, "'[a] court shall take judicial notice if requested by a party and supplied with the necessary information.").

- The IDT/MetroCast interconnection arbitration process (09-048) took approximately 14 months, from the notice of intent to commence interconnection discussions in October 2008, through the filing of the arbitration petition in March 2009, the lengthy arbitration process (including the filing of two separate motions to dismiss by the affected RLEC) and up to the post-decision taking effect of the arbitrated agreement in mid-December 2009.

CLECs seeking to enter any New Hampshire rural territory under the adjudicative hearing requirement of RSA 374:22-g and RSA 374:26, as interpreted in the Union Appeal, will face the prospect of protracted regulatory litigation, such as the three over a year long disputes listed above, to debate issues that will include facts within the control of an adversary that benefits from delays or denial of entry. Based on this limited experience with the early entry efforts of Comcast, MetroCast and IDT, among others, it is hard to imagine a more burdensome entry process.

III. THE CLEC REGISTRATION PROCESS IN RLEC TERRITORIES CONSTITUTES AN IMPERMISSIBLE ENTRY BARRIER UNDER 47 U.S.C. § 253 AND SHOULD BE PREEMPTED

A. Introduction.

The Commission can and should find that the combination of a burdensome adjudicative hearing process applicable to each and every CLEC request to enter a rural ILEC territory and reduced opportunities for CLECs to achieve profits in lightly populated rural areas constitutes a substantial barrier to competition that merits preemption under 47 U.S.C. § 253. Dr. Pelcovits, a national expert for more than 30 years in the area of telecommunications regulation for the FCC, MCI and the MiCRA consulting firm, offers an economic framework and other facts useful to analyzing the entry barriers associated with

the process discussed in Section II above and the extent to which they may constrain the effectiveness of competition in New Hampshire rural exchanges. NECTA Initial Testimony, pp. 4, 18-20, 26-27.[8] If the adjudicative hearing process with a multi-factor analysis in RSA 374:26 and RSA 374:22-g remain in place, these requirements likely would lead to some, if not all, CLECs refusing to enter rural areas due to the prohibitive costs of entry, and to diminished competition in certain rural areas in New Hampshire, thereby denying New Hampshire consumers the freedom to choose among alternative suppliers of voice services. NECTA Initial Testimony, pp. 4-5.

B. The Rural ILEC Areas are Small Exchanges with Limited Profit Potential for New Entrants.

As discussed by Dr. Pelcovits, § 253 barriers are determined based on analyzing the effect of a state statute or regulation on the prospects for competitive entry in that state's telecommunications market. NECTA Initial Testimony, p. 9. One starting point is to look at the profit potential in the RLEC areas that could be obtained were it not for the need to incur extensive entry costs. Data offered by Dr. Pelcovits, and not substantially challenged by the RLECs, demonstrates that the RLECs are "serving small exchanges that are likely to have limited profit potential for new entrants." NECTA Initial Testimony,

---

[8] Dr. Pelcovits summarizes his testimony as explaining how an administrative hearing requirement will lead to no or diminished competition in certain rural local exchange markets in New Hampshire, because the costs of adjudicating issues and the risk of failure to obtain a certificate is high relative to the potential benefit of entering the market. Then Dr. Pelcovits details how profit potential is limited in rural service areas as a result of the low number of necessary access lines and is not significant enough to justify a CLEC expending costs to adjudicate a hearing, in addition to incurring other one-time investment costs and the recurring business and operational expenses in due course.

p. 17. The total regulated revenues for four of the nine companies for which data is available is under $1.1 million and for all but two of the nine is under $2.2 million (with those remaining two at approximately $3 million and $4.5 million). Id. This illustrates the limited upside to a CLEC that may expect to gain only a minority share of a relatively small whole.

Dr. Pelcovits proposed a rough "back of the envelope" model to estimate the potential stream of anticipated profits from the territories of these smaller rural ILECs for cable companies that already have facilities in the ILEC's territory. The analysis provides the upside potential for profits, against which any costs associated with entry would need to be weighed. Furthermore, to the extent entry is unsuccessful (e.g., if a petition is not granted), a CLEC would be even less likely to expend significant resources on future entry efforts. See NECTA Initial Testimony, pp. 18-20, 26-27. Dr. Pelcovits projects a net present value of profit of under $1 million in each of the nine RLEC service areas, profits of under $625,000 in each of the six smaller ones, and profits of under $300,000 in each of the three smallest ones. Id., p. 26. This limited potential universe of profits for a CLEC seeking to enter any one of New Hampshire's RLEC territories could easily be offset by entry costs (i.e., those related to the regulatory process and typical expenses, such as the cost of establishing operations in a new area). Thus, it provides an important backdrop for the Commission's examination of the significant costs associated with a CLEC surmounting the multi-factor adjudicative hearing requirement in RSA 374:22-g and RSA 374:26.

C. General Costs of Entry into Rural Areas are High.

Dr. Pelcovits offered standard industry definitions of an entry barrier as "anything that prevents an entrepreneur from instantaneously creating a new firm in a market," including but not limited to costs "that must be incurred by a new entrant that incumbents do not (or have not had to) bear." NECTA Initial Testimony, p. 10 (internal citation omitted). He also highlighted the importance of "sunk" costs that cannot be recovered by an entering firm if it exits the market after incurring the costs as a measure of the relative riskiness of market entry. Id., pp. 10-11. Entry barriers become particularly significant when the sunk costs of entry are high relative to the expected level of profits. Id., p. 11.

The investment costs associated with entering New Hampshire's rural areas are potentially significant; considering the extent of the potential entrant's business plan, whether it has facilities in place that provide other services, the presence or absence of other competitors in the market, certification and interconnection costs and many other factors. Id., pp. 14-16. Relative to competition, the entrant also would have to consider that it would be competing against incumbents that receive substantial subsidies from the federal Universal Service Fund ("USF") and, in some cases, federal or state economic stimulus funds. Id., pp. 17-18 & n. 16.

Concerns about entry costs that could be incurred by a CLEC above and beyond those costs associated with registration (as discussed in more detail below) are heightened by several positions taken by RLECs in testimony and

data responses. Specifically, Mr. Meredith has characterized CLECs as companies that only seek to target profitable customers and argues that it would unduly favor the CLEC to allow it to "selectively market into a particular territory." RLEC Initial Testimony, p. 16; compare NECTA Rebuttal Testimony, p. 8. Consequently, he has taken the position that the Commission should investigate the impact on RLECs from this "historic" entry pattern. RLEC Initial Testimony, p. 17; compare NECTA Rebuttal Testimony, p. 8. Furthermore, Mr. Meredith has taken the position that CLECs potentially could be ordered to build out facilities that encompass the entire service area of the affected RLEC, without regard to whether the CLEC has existing facilities or how much of the area they cover. See RLEC Response to NECTA-RLECS 2-9 (where Meredith opines that it would be appropriate to require a newly entering CLEC to provide service throughout an RLEC's entire service area even if the CLEC would incur higher costs). This proposal is both "impractical, and, indeed economically unwise" for cable company CLECs and even more so for business-oriented CLECs (such as segTel) that lack local loop facilities – and interest – to serve significant numbers of residential customers. NECTA Rebuttal Testimony, pp. 9-10; cf. segTel's responses to NECTA-SEGTEL 1-1 and 1-2 (projecting lengthy processes for RLEC entry by a non cable provider CLEC whether by employing unbundled network elements or by construction of telecommunication facilities).

Additionally, the RLECs have argued that requiring new CLEC entrants to become ETCs in the RLEC's service territory may be necessary. RLEC Initial Testimony, pp. 14-15. This regulatory category imposes various obligations on

an affected CLEC. See 47 CFR 54.201 et seq. If raised in a registration docket, they may render even more unwieldy that which already is excessively burdensome. The issue of a potential ETC status of a CLEC should not be considered as part of a certification analysis.

Both the buildout and ETC issues raised by the RLECs make clear that securing a registration in a rural area may only be the first of many hurdles for a CLEC to surmount in order to offer new and differentiated telecommunications services to New Hampshire's rural customers and likely would result in a CLEC abandoning its entry efforts. Beyond these requirements are the interconnection negotiation and potential arbitration that must follow certification – which can also be costly.

D. Sunk Costs Relating to Registration are Excessively High Due to the Adjudicative Hearing Requirement.

Dr. Pelcovits opined that the sunk costs for a new entrant associated with following the requirements of the adjudicative hearing process mandated by RSA 374:22-g, RSA 374:26 and other New Hampshire statutes are "substantial relative to the size of these markets and the concomitant profit potential," even without taking into account additional entry-related sunk costs associated with interconnection negotiations/arbitration. NECTA Initial Testimony, p. 21; see Joint Stipulation (describing adjudicative process). Dr. Pelcovits testified as follows:

> The factors of RSA 374:22-g are expansive, and could require significant costs in assembling and litigating as an adversarial evidentiary proceeding as envisioned by the [RLECs] and set forth in the [Joint Stipulation]. The time to market would also be significantly impacted by these

> proceedings. In particular, one of the public good elements of RSA 374:22-g, "the incumbent utility's opportunity to realize a reasonable return on investment," could turn the entry process into a potential rate case for the incumbents.

NECTA Initial Testimony, p. 21 (emphasis added).

The above reference to an extensive, expensive "potential rate case" is no exaggeration. Id. As Dr. Pelcovits further explained, in a registration request a potential entrant would almost certainly need to conduct a thorough analysis to rebut an RLEC claim that the presence of a competitor would reduce its revenues and, if expenses did not drop significantly, its overall rate of return on investment. Id., p. 22. This process could include an analysis of the RLEC's "rate base, operating expenses, and projected revenue from current and new sources (e.g., data and video)...[and] a fact-specific analysis of whether the incumbent could compensate for lost revenue through its new, unregulated revenue streams, such as wireless, video, or high speed data services...." Id.

A requirement to sort out competing claims about the reasonableness of a rate of return makes necessary an investigation as part of "the reality of regulation" and would not be easily avoided in an adjudicative setting. Id., p. 23; see also Paul B. Vasington, "Incentive Regulation in Practice: A Massachusetts Case Study," *Review of Network Economics*, Vol. 2, Issue 4, December 2003, p. 455 (referencing when the Massachusetts Commission intended to conduct a limited in scope financial review under a supposedly less regulated price cap regime and noting that said review instead "ended up being tantamount to a rate case..."). It is "likely to be a very time-consuming and costly undertaking." NECTA Initial Testimony, p. 22. That the state statutes require an adjudicative

hearing process (absent waiver by the affected RLEC) and require consideration of the impact of entry on the RLEC's own rate of return, an inquiry that may require a rate case-like proceeding, are central to Dr. Pelcovits' concerns that these statutes raise significant entry barriers and should be preempted under 47 U.S.C. § 253. Furthermore, issues above and beyond rate of return, such as the other statutory factors under RSA 374:22-g, could raise complex fact-gathering and analysis to evaluate whether entry will have adverse impacts on universal service and carrier of last resort obligations. As stated earlier, these policy issues can only be addressed properly in a generic rulemaking proceeding, not as part of the application process for individual CLECs. NECTA Initial Testimony, p. 25.

Legal fees from an extensive proceeding are likely to be "significant" and the time spent litigating a full docket could significantly impact resources and time that could be spent to market to potential consumers. Id., p. 21. Dr. Pelcovits' economic framework reflects how the limited revenues associated with entering rural ILEC territories in New Hampshire could be eroded by entry costs based on the reasonable assumption that an intervener could spend in excess of $100,000 in legal and expert fees, exclusive of all other entry-related investment and regulatory costs. Id., pp. 26-27. The recent history of proceedings seeking entry into New Hampshire rural territories (see Section IIC above) demonstrates that RLECs have devoted, and likely will continue to devote, very substantial resources to responding to CLEC entry efforts, and is supportive of the

reasonableness of Dr. Pelcovits' cost estimate for a CLEC applying to enter a rural service territory in New Hampshire. Id., pp. 27-29.

IV. POLICY FACTORS SUPPORT PREEMPTION OF THE MULTI-FACTOR ADJUDICATIVE PROCESS FOR RURAL ENTRY

As discussed in the NECTA Initial Testimony, especially at pp. 11-13, preempting the adjudicative hearing requirement in RSA 374:22-g and RSA 374:26 is consistent with important policy goals. Most importantly, telecommunications competition is in the public interest of rural consumers as it generally drives down prices and increases product variety and quality. NECTA Initial Testimony, p. 13.

Preempting the adjudicative hearing requirement also fully comports with pro-competition policies under New Hampshire law. Notably, the New Hampshire Constitution establishes that "[f]ree and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." New Hampshire Constitution at Part II, Article 83. Particular to the telecommunications industry, the State's policy is to "encourage competition for all telecommunications services, including local exchange services, which will promote lower prices, better service, and broader consumer choice for the residents of New Hampshire." 1995 N.H. Ch. 147, p. *1. The legislature's intent to encourage competition in the industry even in rural areas was made evident with the repeal of former statute RSA 374:22-f, which had required separate statutory procedures for entry into rural areas, and its simultaneous decision to

apply the formerly non-rural RSA 374:22-g standards to all service areas in New Hampshire. See 2008 NH ALS 350, pp. *1-2.

The Commission has firmly endorsed the application of pro-competitive principles in its telecommunications orders and actions.[9] Most recently, in the final Order approving a settlement between and among MetroCast, IDT and Union Telephone for entry by both MetroCast and IDT into Union's service area, the Commission assessed the factors enumerated in RSA 374:22-g, II and found that competitive entry is in the public good. MetroCast Application, pp. 5-7. More specifically, the Commission determined that allowing new competitors into a territory enhances competition by permitting new providers to offer new and different service alternatives. Id., p. 5; see also CRC Communications, p. 3. It also determined that in the presence of non-regulated companies, it is fair to allow other regulated competitors the opportunity to compete. Id., p. 6; see also CRC Communications, pp. 3-4; Comcast Phone, pp. 19-20. Further, the Commission found that competition leads to efficiency and that a means to achieve economic efficiency is to eliminate barriers to competitive entry. Id., p. 6, see also Comcast Phone, p. 20. The Commission also addressed concerns about carrier of last resort obligations, noting that the availability of alternate rate regulation ensures that the provision of universal service to achieve the carrier of last resort obligations will not be compromised. Id., p. 6.

---

[9] See, e.g., MetroCast Cablevision of New Hampshire, LLC Application for Certification dated September 19, 2008, Order No. 25,193 (Jan. 18, 2011) ("MetroCast Application"); CRC Communications of Maine, Inc., Order No. 25,165 (Nov. 8, 2010) ("CRC Communications"); Comcast Phone of New Hampshire (Comcast Phone), Order No. 24,938 (Feb. 6, 2009) ("Comcast Phone").

All of these policy goals support the preemption of the burdensome adjudicative hearing requirement in the entry process for rural areas as interpreted in the Union Appeal. Legitimate RLEC concerns can be addressed in dockets such as alternative rate regulation requests or service investigations or rulemaking proceedings and not in the individual case-by-case process by which each CLEC requests a finding granting it leave to enter the territory of each RLEC.

Conclusion

The Pelcovits' testimony is clear and well supported on the record. The reduced profit potential of rural territories in New Hampshire, coupled with an adjudicative hearing process permitting evidence on the affected RLEC's own rate of return, creates a "very high likelihood that the envisioned adjudicative process could become a significant barrier to entry into the rural exchanges of New Hampshire...especially when considered in conjunction with other entry-related sunk costs ... [and that] rural ILECs would have an incentive to use the process as an entry barrier because of the potential adverse effects of entry on their profits." NECTA Initial Testimony, p. 30. Furthermore, compelling pro-competition and pro-consumer policy grounds support elimination of this requirement. Accordingly, based on these facts and analysis and the 47 U.S.C. § 253 legal standard, the Commission should find and rule that the adjudicative hearing process in RSA 374:22-g, RSA 374:26 and other statues as interpreted in the Union Appeal is federally preempted.

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC.

By its attorneys,

Robert J. Munnelly, Jr.
Murtha Cullina LLP
99 High Street
Boston, MA 02110-2320
Telephone: (617) 457-4000
rmunnelly@murthalaw.com

and

William D. Durand, Executive V.P./Chief Counsel
New England Cable and Telecommunications
Association, Inc.
10 Forbes Road, Suite 440W
Braintree, MA 02184
Telephone: (781) 843-3418
wdurand@necta.info

DATE: February 11, 2011

2089482