THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 10-183

GRANITE STATE TELEPHONE, INC., DUNBARTON TELEPHONE, INC., BRETTON WOODS TELEPHONE, INC., AND DIXVILLE TELEPHONE COMPANY

Petition by Certain Rural Telephone Companies Regarding CLEC Registrations within Their Exchanges

BRIEF OF segTEL, INC.

Resolution of this docket requires the New Hampshire Public Utilities Commission to apply § 253 of the Federal Telecommunications Act ("TCA"), 47 U.S.C. § 253, which sets limits on the authority of state and local governments to regulate telecommunications providers. On July 13, 2010, incumbent local exchange carriers (ILECs) Granite State Telephone, Inc., Dunbarton Telephone, Inc., Bretton Woods Telephone, Inc., and Dixville Telephone Company (collectively the Rural ILECs or Petitioners) filed with the Commission a petition challenging certain registrations granted by the Commission purporting to authorize competitive local exchange carriers (CLECs) to engage in business as telephone utilities within the Rural ILECs' service territories as part of their authorizations to operate statewide. The Petitioners contend that the registrations were not authorized by the *process* required by certain state statutes found necessary by the New Hampshire Supreme Court in *Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 309 (2010). The Rural ILECs seek an order declaring that the authorizations to operate within the Rural ILECs' service territories are to be rescinded or that they are null and void. segTEL respectfully submits that the "process" required by the state statutes at issue creates a barrier to entry to segTEL and other similarly situated CLECs and is therefore preempted by 47 U.S.C.§ 253. For reasons stated herein, the RLEC's petition must be denied.

I. INTRODUCTION

The Petitioners are rural telephone public utilities (Rural ILECs) operating in designated franchise service territories within New Hampshire. In December 2008, the Rural ILECs became aware that a CLEC had requested authorization to provide telephone services throughout the state, including within the Rural ILECs' service territories. After the Commission granted that authorization, the New Hampshire Telephone Association, on behalf of the Rural ILECs, stated to the Commission that it believed the authorization was improperly granted because it did not comport with certain state statutory requirements, s*ee* RSA 374:26, 374:22-g, and 374:22-e. Subsequently, in *Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 360 (2010), the New Hampshire Supreme Court determined that the authorizations obtained by CLECs to operate in the territories of certain ILECs similar to the Petitioners were not granted in accordance with state statutory requirements. The Supreme Court, however, remanded the matter to the Commission to determine whether the state statutory requirements are preempted by federal law.

Following the Supreme Court's opinion, the Rural ILECs filed the instant petition contending that any authorizations allowing CLECs to operate in their service territories that were granted without following the requirements of state law are null and void, and that the requirements of state law are not preempted by federal law.

A. Joint Stipulation of Facts[1]

Formerly, RSA 374:22-f prohibited entry by competitive local exchange carriers ("CLECs") into territories of telephone utilities with fewer than 25,000 access lines, also known

[1] This Joint Stipulation of Facts was filed with Commission earlier this Fall.

as RLECs, apart from the general CLEC entry statute at RSA 374:22-g. RSA 374:22-f was eliminated by 2008 legislative amendments. Thereafter, an amended RSA 374:22-g applies to CLEC requests to provide telecommunications services, including local exchange services and any other telecommunications service, in a telephone utility service territory in New Hampshire.

On May 20, 2010, the New Hampshire Supreme Court released its Opinion in the case Appeal of Union Telephone Company d/b/a Union Communications, Consolidated Docket Nos. 2009-168 and 2009-432 (the "Opinion"), a copy of which can be found at 2010 N.H. LEXIS 48.

II. ARGUMENT

It is neither the registration nor authorization of a competitive local exchange provider that is at issue here. It is whether the Commission, as a matter of law, may consider as part of that registration process any or all of the factors the law mandates that the Commission consider. This issue depends on an analysis of subsection (a) of 47 U.S.C.§ 253, which limits the authority of state and local governments to regulate telecommunications providers and subsection (b) which permits a state to impose regulation on a competitively neutral basis to advance universal service, to protect the safety and welfare of the public, and to safeguard consumer rights. Specifically, the above Joint Stipulated Facts demonstrate that RSA 374:22-g violates § 253(a) and is not saved by the safety provisions of § 253(b). segTEL discusses these sections of § 253 in turn.

a. 47 U.S.C. § 253

Congress enacted the Communications Act of 1996 ("The 1996 Act"), 47 USC § 253, to ensure that telecommunications providers have competitive access to state and local telecommunications markets. *See Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006). In the 1996 Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the States" on all "matters addressed by the 1996 Act," including intrastate matters that formerly were within the states' exclusive authority. *AT & T v. Iowa Utilites Bd.*, 525 U.S. 366, 378 n.6 (1999); *see also MCI Telecommunications Corp. V. Bell Atlantic Pennsylvania*, 271 F.3d 491, 510 (3d.Cir. 2001) (in 1996 Act, "Congress validly terminated the states' role in regulating local telephone competition.")[2]

At the same time, Congress "recognized the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and to "manage and demand compensation for the use of their rights of way." *Cablevision of Boston, Inc. v. Public Improvement Comm'n,* 184 F.3d 88, 98 (1st Cir. 1999).

The provisions of § 253 balance these interests, providing, in relevant part:

(a) In general

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.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

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[2] Even in those few instances where Congress gave authority to state *commissions*, those commissions are required to "regulat[e] in accordance with federal policy," and "if the federal courts believe that a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. The 1996 Act thus "transferred broad authority from state regulators to federal regulators," while leaving only "corners in which the states ha[ve] a role." *Indiana Bell Telephone Co. V. Indiana Utility Regulatory Com'n*, 359 F.3d 493, 497 (7th Cir. 2004). And, crucially, the "scope" of the limited role for state commission under the 1996 Act is "measured by federal, not state law." *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000).

> Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from the telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
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> (d) Preemption
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> If, after notice and an opportunity for public comment, the [Federal Communications Commission] determines that a State or local government has permitted or imposed by any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.
> 47 U.S.C. § 253.

It is well-established that § 253 (a) "authorizes preemption of state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications services." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 128 (2004). Thus, under the Supremacy Clause of the United States Constitution, "[t]he statutorily authorized regulations of a [federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see also KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49 (1st Cir. 1999).

The First Circuit, which governs the decision of this Commission, has interpreted § 253(a) to preempt laws and regulations that "may prohibit or have the effect of prohibiting" the provision of telecommunications services and requires a plaintiff to show a mere possibility of prohibition, rather than actual or effective prohibition. *See Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla, supra*, 450 F.3d at 18. The First Circuit based this rationale on decisions by the Federal Communications Commission ("FCC") which explained, "in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it 'considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.' " *Id.*, *citing TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir.2002) (quoting *Cal. Payphone Ass'n*, 12 F.C.C.R. 14191 (1997)). The First Circuit has also noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Id.; see also Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir.2004) ("[A] regulation need not erect an absolute barrier to entry in order to be found prohibitive.") Thus, the First Circuit decisions, which are binding on this Commission, prohibit the state or this Commission from creating, enacting or enforcing any regulation or *local legal requirement* which prohibits or possibility of prohibiting any interstate or intrastate telecommunications service or which materially inhibits or limits segTEL's ability to compete in a fair and balanced legal and regulatory environment.

b. RSA 374:22-g violates 47 U.S.C. § 253(a)

The threshold question that the New Hampshire Supreme Court has put before this Commission is whether federal law preempts the Commission from considering all of the factors listed in RSA 374:22-g II in making a determination that the provision of telecommunications services in an RLEC territory is consistent with the public good.

RSA 374:22-g I sets out two key elements: First, it states that all telephone franchise areas ***shall* be nonexclusive** to the extent consistent with federal law and preempts any other contrary law. Second, it determines that the Commission has the authority to authorize the provision of telecommunications services in a territory so long as it is consistent with the public good. It is this determination of what constitute "the public good" that violates 47 U.S.C. §253(a) because the "public good" is both impermissibly vague and irrelevant to the ability of a competitor to provide utility service.

RSA 374:22-g II sets forth those factors that the Commission shall consider in making a determination of the public good. These factors include: 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 expense. It is these factors that run afoul of federal law because the law asks the Commission to consider things that the Commission is preempted by federal law from considering.

The entrance of segTEL as a CLEC has already been found to be in the public good in every other part of the state. If the statute already has determined that the territory is non-exclusive, the only question is whether a CLEC is qualified to serve in those "RLEC" areas. However, the statute charges the Commission with assessing different criteria on whether CLEC entry into the market is in the public good based on qualities inherent to the RLEC and the market rather than qualifications of the CLEC making the application, creating impermissible protection for the Rural ILEC. Congress already chose a means of protecting RLEC and small LECs in 47 U.S.C.§ 251(f), and in so doing, expressed its intent to preclude states from imposing far more restrictive protections such as requiring CLECs to address the factors listed in RSA 374:22-g II.

This case is identical to *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, 12 F.C.C.R. 15639 (1997). In *Silver Star*, Wyoming's rural incumbent protection provision gave incumbent LECs with 30,000 or fewer access lines the ability to block the grant of CPCN applications of potential competitors. The incumbent LEC involved in this matter exercised that veto power with respect to Silver Star's CPCN application to provide competing local exchange service in the Afton exchange; in turn, as required by the Wyoming Act's rural incumbent protection provision, the Wyoming Commission denied Silver Star's application and thereby barred Silver Star from entering the Afton local exchange market. The FCC held that the rural incumbent protection provision clearly prohibits Silver Star from providing telecommunications service in the Afton exchange, a prohibition proscribed by section 253(a).

> Indeed, section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers. The express preemption authority granted to the Commission under section 253 is designed to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.
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> Section 253(a), however, does not exempt from its reach State-created barriers to entry that are scheduled to expire several years in the future. In any event, a "temporary" ban on competition that lasts for a minimum of nine years and a maximum of twelve years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition. Indeed, any law freezing the telecommunications status quo for a nine-to-twelve year period would severely restrict the development of competition that Congress sought to promote by passing the 1996 Act. Thus, this absolute prohibition on Silver Star's competitive entry for a minimum of nine years from the date of enactment of the 1996 Act is precisely the type of action Congress intended to proscribe under section 253(a), absent a demonstration that the rural incumbent protection provision and the *Denial Order* are an exercise of authority specifically reserved to the State of Wyoming under section 253(b).
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> *Silver Star*, 12 F.C.C.R. 15639

The FCC thus not only preempted the enforcement of Wyoming's denial of *Silver Star's* application it also preempted the rural incumbent protection provision of Wyoming's statute.

The process outlined by the Joint Stipulation of Facts, showing that every CLEC registration in RLEC territory will require the CLEC to provide justification for the RLEC's ability to show a profit rises to a barrier to entry under section 253. This process without question creates a barrier to entry for segTEL or other similarly-situated CLECs. The imposition of a requirement that a CLEC collect and file information on any entity but itself is unique to New Hampshire's statutes. New Hampshire's law is unique because it puts the burden of proving not only that competition itself is in the public good, but that the entity against which an entrant will compete is fully capable of withstanding that competition.

Since the RLECs have asked to have segTEL's approval revoked, the law absolutely has the effect of prohibiting the ability of an entity to provide "interstate or intrastate telecommunications services." segTEL has had authority to provide service in RLEC territories since March 3, 2009 but, in response to this docket, has agreed to delay provision of service until the issue is resolved. Even though segTEL has the Commission's approval to serve, it understands that if it acts on that approval, the RLECs would raise an objection. segTEL agreed to voluntarily delay its entry into the RLECs market for the pendency of this docket. Since Granite State continues to serve customers in its territory, this limitation on segTEL is anti-competitive and discriminatory.

Since the RSA 374:22-g has already had the effect of prohibiting segTEL's ability to provide service, the statute is preempted under Section 253 (a).

c. RSA 374:22-g does not advance the permissible considerations of § 253(b)

Once a provision runs afoul of Section 253(a), it may still be permissible if it falls under the savings clauses of Section 253(b), which preserve a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; and (iii) "necessary" to accomplish certain enumerated public interest goals. Thus, RSA 374:22-g must be preempted under Section 253(d) unless it meets all three of the criteria set forth in section 253(b).

Any state statute which has the effect of restricting telecommunications providers other than an Rural ILEC from having competitive access to state and local telecommunications markets necessarily violates 47 U.S.C. (b) on its face. *See Puerto Rico Telephone Company*, 450 F.3d at 15. Apart from consideration of universal service, none of the factors listed in RSA 374:22-g is established exclusions to federal preemption on state regulation. Moreover, pursuant to the New Hampshire Codes of Admin. Rules Ann. Puc 306.01, 413.01 and RSA 155-A:1, the Commission and the state have created regulations which protect the public safety and welfare. Furthermore, the rights of consumers are not protected by restricting competition by CLECs in Rural ILEC territory.

Finally, simpy put, imposing RSA 374:22-g on segTEL and similarly-situated CLECs cannot be accomplished on a "competitively neutral basis." Congress enacted the TCA to maintain 'the balance...necessary to effectuate its intent to enhance competition and eliminate local monopolies while leaving room for regulation of issues of particular state and local concern. . .to ensure that telecommunications providers have competitive access to state and local telecommunications markets." *See Puerto Rico Telephone Company*, 450 F.3d at 15; *Cablevision of Boston, Inc*. 184 F.3d at 97-98. RSA 374:22-g, II, with its laundry list of considerations of the public good disrupts the balance between a vibrant competitive landscape and local regulation of public utility activity. For the reasons stated by the FCC, RSA 374:22-g, II is not competitively neutral:

> We find that the rural incumbent protection provision is not competitively neutral. This State statutory provision favors certain incumbent LECs over all potential new entrants and allows those incumbent LECs, entirely at their own discretion, to determine if and when they will face competition until at least January 1, 2005. Further, the rural

> incumbent protection provision awards those incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry. Such disparity in the treatment of classes of providers violates the requirement of competitive neutrality and undermines the pro-competitive purpose of the 1996 Act. We reiterate what we stated in the *Classic Telephone Decision*: "Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry...."
> *Silver Star,* 12 F.C.C.R. at 15658

Initially, an aggrieved telecommunications provider must first establish that the ordinance or regulation violates § 253(a), and then the burden would shift to the state or local government to establish that the safe harbor provision of § 253(b) applies. *See Puerto Rico Telephone Company, Inc.*, 450 F.3d at 18. As segTEL has established that the processes of RSA 374:22-g,II violates § 253(a), the burden is properly on the Commission to show that the statute is protected by the safe harbor provision to establish that § 253(b) applies. *Id*. *See also City of Santa Fe,* 380 F.3d at 1273 n.10; *N.J. Payphone Ass'n,* 299 F.3d at 240; *Bell South Communications, Inc.,* 252 F.3d at 1192; *see also In re the Petition of Minnesota,* 14 F.C.C.R. 21697, 21704 n.26 (1999) ("Although the party seeking preemption bears the burden of proof that there is a violation of section 253(a), the burden of proving that a statute, regulation, or legal requirement comes within the exemptions found in sections 253(b) and (c) falls on the party claiming that exception applies"). segTEL respectfully submits that RSA 374:22-g does not fall into these protections.

The safe harbor of § 253(b) allows a state or local government to enact regulations to manage the public rights of way or to require fair and reasonable compensation from the telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government. However, RSA 374:22-g mandates that the Commission consider “fairness.” It does not define “fair” or specify to which parties’ fairness is owed. In this consideration the statute is impermissibly vague. Further, RSA 374:22-g mandates that the Commission consider “economic efficiency,” “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 expense.” While these factors may have been ones that Congress considered in creating the Telecom Act, they are not considerations that the Commission may permissibly consider under section 253(b).

Finally, RSA 374:22-g instructs the Commission to include the policy consideration of “carrier of last resort obligations.” While this policy consideration is of interest to the Commission and to the state, they are not an element that can permissibly be considered in the determination of whether a utility may provide “any interstate or intrastate telecommunications service.”

III. CONCLUSION

Congress enacted the TCA in an attempt to maintain "the balance . . . necessary to effectuate its intent to enhance competition and eliminate local monopolies while leaving room for reasonable regulation of issues of particular state and local concern." *N.J. Payphone Ass'n,* 299 F.3d at 245. RSA 374:22-g disrupts this balance. While states have an interest in protecting the safety and welfare of the public and enacting rules that ensure safe and reliable utility service, the statute in this case is preempted by § 253(a) of the TCA and is not saved by any safe harbor provision.

Respectfully submitted,

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By its general counsel,

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