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

segTEL, INC. OBJECTION TO MOTION FOR REHEARING

NOW COMES segTEL, Inc. (segTEL), and, respectfully objects to the RLECs motion for rehearing of the Commission's Order No. 25,277 dated October 21, 2011 (the Order).

On November 3, 2011, incumbent local exchange carriers Granite State Telephone, Inc., Dunbarton Telephone, Inc., Bretton Woods Telephone, Inc., and Dixville Telephone Company (together the RLECS) moved this Commission for a rehearing of the Order. The Commission reviewed the voluminous record in this case before reaching a decision, considering (1) the Joint Stipulation of Agreed Facts filed October 5, 2010; (2) the parties' initial and reply briefs; (3) the parties' initial and reply testimony; and (4) all data requests and responses exchanged by the parties. The Commission ultimately found that RSA 374:22-g and RSA 374:26 were preempted by the Federal Telecommunications Act (TCA), 47 U.S.C § 253. In particular, the Commission determined that the language requiring an analysis of what constitutes "the public good" 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. Moreover, the Commission found that the enumerated factors set forth in RSA 374:22-g II run afoul of federal law because the law asks the Commission to consider things that the Commission is preempted by federal law from considering.

ARGUMENT

A. THE RLECS HAVE NOT PROVEN THAT COMMISSION'S ORDER IS UNLAWFUL OR UNREASONABLE

The RLEC filing identifies the standard of review relevant to motions for rehearing. To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable (RLEC brief at 2-3 citing PUC Order 25, 194 at 3. segTEL respectfully submits that the RLECs have not met their burden of proof.

The Commission considered the process outlined by the Joint Stipulation of Facts (Stipulation) of the parties, detailing nine steps in an adjudicative registration process that would be required by RSA 374:22-g and RSA 374:26 if they are not preempted by federal law. The Commission found that consideration of *any* of the factors that results in denial of entry into a telecommunications service area is pre-empted. Order at 32. At this point the RLECs have abandoned any argument to refute the Commission's simple, unequivocal finding in favor of preemption, and, on that basis alone, they fail to prove that the Commission's Order is "unlawful or unreasonable" pursuant to RSA 541:4.

Instead, the RLECs seek to relitigate this docket for another chance at producing the order that they would have liked, proposing that different analyses of the factors set forth in RSA 374:22-g, II could lead to different results, arguing that the factors comprising the process are "wholly independent of each other" and, therefore, "that which is constitutional may stand while that which is unconstitutional will be rejected" citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (weighing state obscenity statute against First Amendment rights). All parties already had opportunity to brief this issue at earlier points within the docket and the RLEC attempt to relitigate this now should be rejected. At this late hour the RLECs argue, that it was "unreasonable for the Commission to have approached its analysis with the belief that any defect

in the state statute rendered it void in its entirety." RLEC Motion at 4. In effect, the RLECs hope to validate otherwise preempted statutes by piecemeal distortion of factors set forth in RSA 374:22-g, II. The RLECs also imply that the preempted statutes could be analyzed in a way to create other alternative orders. These contentions are entirely without merit. The Commissions lawful, reasonable and thoroughly reasoned order is not unlawful or unreasonable simply because in the theoretical realm of possibility there may or may not have been other lawful and reasonable alternative orders that would have better suited the RLEC's interests.

B. THE RLECS HAVE FAILED TO SHOW HOW THE STATE STATUTES SATISFY THE COMPETITIVELY NEUTRAL CRITERION OF § 253(B).

The Commission correctly determined that RSA 374:26 RSA 372:22-g do not satisfy the competitively neutral criterion of § 253(b). Order at 35. The RLECs appear to be arguing that the Commission's decision is competitively *biased*, suggesting that Section 253 was specifically designed to protect *the incumbent* from discriminatory treatment, and, by permitting competitors entry into RLEC service territory, it is "favor[ing] the CLEC at the expense of the ILEC." RLEC Motion at 12. This argument is also late, moot, and entirely without merit. No possible reading of 47 USC § 253's [titled "REMOVAL OF BARRIERS TO ENTRY"] savings clause can be parlayed into a conclusion that its ultimate purpose is to protect ILECs from market entrance through the erection of market barriers. There are no barriers to entry prohibiting the RLECs from competing within their own markets. Furthermore, the RLECs' complaint that a heavier regulatory regime unfairly burdens the RLEC much more so than it does the CLEC is unavailing. The Telecom Act provides for many different regulations on incumbents that competitors are not subject to - among them obligations of resale, unbundling, and colocation. No ILEC has ever prevailed in stating that these obligations are illegal on the basis of "competitive neutrality," or that their exclusive local franchise must be preserved unless CLECs

are required to provide UNEs. On the flip side of the same coin, CLECs entering the market do not get to enjoy the fruits of a century of monopoly power, a historically embedded and familiar customer base, generous government subsidies and a guaranteed rate of return.

CONCLUSION

For all the reasons stated above, the Commission's analysis in finding that RSA 374:26 and RSA 374:22-g are preempted by § 253(a) is correct. The Commission's further analysis that RSA 372:22-g is not saved by the safe harbor provisions in §253(b) because the State provision fails to satisfy the competitively neutral criterion is also correct. The RLECs have failed to meet their burden of proof to show that the Commission's order is unlawful or unreasonable and simply would have preferred a different result in these proceedings. The Commission should deny the RLECs' request because their motion fails to state, with particular clarity, points of law or fact that the Commission overlooked, mistakenly conceived in the underlying proceedings. *Dumais v. State*, 118 N.H. 309, 312 (1978). segTEL respectfully requests that the Commission deny the RLEC's Motion for Rehearing.

Respectfully submitted,

SEGTEL, INC.
By its general counsel,

November 14, 2011

/s/ Carolyn Cole
Carolyn Cole, Esq.
NH Bar No. 14549
P.O. Box 610
Lebanon, N.H. 03766
603-676-8225

cc: Service List