

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DRM 12-036

RULEMAKING – PUC 400 RULES

**NECTA'S COMMENTS ON
DRAFT FINAL RULES PROPOSAL**

NOW COMES New England Cable and Telecommunications Association, Inc. (“NECTA”), by and through its undersigned counsel, and respectfully submits these comments on the draft final rules proposal issued by the New Hampshire Public Utilities Commission (“Commission” or “PUC”) on October 3, 2013 in the above-captioned docket. These comments are intended to supplement the oral comments provided by NECTA at the public hearing held October 29, 2013 in this docket. In addition, NECTA submits herewith a redlined document containing NECTA’s suggested revisions to the draft rules. NECTA expressly reserves the right to modify its positions and/or revise the enclosed redlined document further as the rulemaking process continues.

NECTA appreciates the opportunity to file these comments and commends Commission Staff for the time and effort spent on developing the draft rules. Notwithstanding Staff’s commendable effort in this rulemaking docket, NECTA has identified certain provisions of the draft rules proposal to which it objects, and others that it suggests be reworded. Those provisions, as well as the reasons for NECTA’s objections and/or suggested revisions, are set forth below. To the extent possible, these comments are presented in the order in which the issues are raised under the draft final

proposed rules, along with citations to the pages of the attached redlined draft where the suggested revisions appear.

PART Puc 401 PURPOSE AND APPLICATION

Puc 401.02 Application

This section should be revised to reflect that the rules apply except to the extent preempted by the Telecommunications Act of 1996, **and state and other applicable federal law.** *See NECTA's Redlined Version of Fixed Text Draft Final Proposal October 3, 3013* ("NECTA's Redlined Draft") at 1.

PART Puc 402 DEFINITIONS

Puc 402.10 "Gross utility revenue."

This definition relates to the issue of utility assessments which is the subject of another pending docket (IR 13-038) and legislation proposed by Commission Staff. NECTA believes that the Commission's rules concerning utility assessments should not be revised until such time as Docket IR 13-038 is concluded and the Legislature has provided direction on this issue. Accordingly, NECTA recommends that this definition should be deleted. *See NECTA's Redlined Draft at 3.*

Puc 402.19 "Significant facility disruption."

This definition should be revised to be consistent with federal regulations concerning wireline outage requirements at 47 CFR 4.9(f). *See NECTA's Redlined Draft at 5.*

NECTA recommends adding federal definitions of "telecommunications" and "telecommunication service" and eliminate the definition of "voice service" found at Puc 402.23.

Chapter PUC 400 is entitled: "Rules for Telecommunications" and the term "telecommunications" appears throughout the draft rules¹. In addition, the term "telecommunications services" is found in the statutory definition of "excepted local exchange carrier" ("ELEC") (*i.e.*, "any provider of *telecommunications services* that is not an incumbent local exchange carrier") *see* RSA 362:7, I (c)(3), and in the definition of competitive local exchange carrier ("CLEC") at 402.04. However, the draft rules do not define the terms "telecommunications" or "telecommunications service." This oversight, which can be a source of uncertainty and confusion, may be easily remedied by including the definitions appearing in federal law, or incorporating those definitions by reference. Under federal law telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received" (47 USC §153(50)), and "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." (47 USC §153(53)). *See* NECTA's Redlined Draft at 5.

Instead of defining telecommunications, the proposed rules introduce a new term, "voice service," (at 402.04) which is intended to reflect the language in RSA 362:2, *i.e.*, "the conveyance of telephone messages for the public." Thus, under the draft rules, the provision of "voice service" would be the operative criterion for identifying providers who are public utilities. However, this is improper as "voice service" does not appear in the statutory definition of public utility, nor is it used to describe the entities over which

¹ For example, sections of the draft rules containing the definitions of CLEC and ILEC (402.04 and 402.11), tariffs for wholesale service (404.05), and intercompany cooperation and interconnection (407.01 and .02), all refer to "telecommunications".

the Commission has authority². In view of the foregoing, the rules' use of the term "voice service" is inappropriate.

Using the term "voice service" to determine which carriers are public utilities is also improper because it results in an overly narrow interpretation of RSA 362:2. It is well settled that rules cannot add to, detract from, or in any way modify statutory law. *See Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 252 (2011). Focusing the Commission's authority on "voice service" entities instead of those that meet the federal definition of telecommunications service providers could have far-reaching effects. For example, under section 404.01 (b), entities registered as CLECs on the effective date of the rule whose registered services do not include "voice service" would be notified that ELEC registration is not required, and their CLEC authorizations would expire. (*See discussion, infra* at p. 6). This could cause some federally-recognized telecommunications service providers such as providers of wholesale telecommunications services to be excluded from state regulatory jurisdiction. This discrepancy would occur because the definitions of telecommunications and telecommunications service under federal law are not restricted to retail voice service. In order to avoid confusion and inconsistency with state and federal law, the term "voice service" should not be used to designate which carriers are public utilities or registered providers in New Hampshire. NECTA therefore recommends that the definition of "voice service" found at Puc 402.23 be deleted from the draft rules. *See* NECTA's Redlined Draft at 6.

² For example, RSA 374:22-g, expressly references the Commission's authority over entities providing "telecommunications services."

Puc 402.22 “Transfer of customer base.”

NECTA recommends that this definition be clarified to refer to the transfer of all or substantially all of a provider’s access lines to an unaffiliated provider. *See* NECTA’s Redlined Draft at 5. NECTA believes that only transfers of a provider’s access lines to unrelated third parties (i.e. non-affiliates) should, as matter of state law, trigger the reporting requirements in Puc 405.03.

PART Puc 403 TELEPHONE UTILITY REQUIREMENTS

This entire section should be deleted. *See* NECTA Redlined Draft at 6. This section (including its two subsections) simply states that the intent of the rules is to establish requirements for all telephone utilities and that ILECs and ELECs must comply with sections Puc 403 through 409. These concepts are already covered by the purpose section (Puc 401.01) and application section (Puc 401.02) of the draft rules. Thus, PART Puc 403 is superfluous and unnecessary and therefore should be deleted from the draft rules.

PART Puc 404 TELEPHONE UTILITY REGULATORY REQUIREMENTS

Puc 404.01 (a) –(c). Registration of Telephone Utilities Previously Authorized as CLECs, CTPs, PSPs, or ILECs.

CLEC and CTP status should not be eliminated. ELEC authorization should include authorization to provide telecommunications service and not simply voice service. *See* NECTA Redlined Draft at 6-7.

Section 404.01(a) of the draft rules provides that existing CLECs whose registered services include voice service shall all become registered as “ELECs”

authorized to provide “voice service” in the same areas for which they were authorized by their prior registrations/franchises. The rules also provide that the CLECs will be provided with a “telephone utility identification number” and their CLEC authorization shall expire. Section 404.01(b) provides that existing CLECs whose registered services do not include “voice service” shall be notified that ELEC registration is not required for the provision of their services, and their CLEC authorizations shall expire. Section 401.04(c) provides that existing CTPs shall become registered as an ELEC authorized to provide “voice service” in the same area for which they were previously authorized and will be provided with a “telephone utility identification number,” whereupon their CTP authorization will expire. For the reasons set forth below, NECTA believes that is inappropriate and unnecessary for CLEC and CTP registrations to expire. In addition, NECTA believes that the authority conferred by the PUC on the new ELEC/former CLEC or CTP should not be limited to voice service.

First, nothing in either SB 48 or HB 542 eliminates CLEC and CTP status, and therefore, those recent enactments do not justify abandonment of such status. Second, CLECs are still mentioned by name in New Hampshire statutes. For example, RSA 362:8, III provides that the PUC still has the authority to impose and enforce ELEC obligations relating to provision of services to “competitive local exchange carriers” and “interexchange carriers” (CTPs). Another example is RSA 374:22-o (entitled “Regulation of Competitive Telecommunications Providers”) which specifically uses the terms “competitive local exchange carrier” and “competitive toll providers”, in indicating that the Commission does not have authority over those carriers’ financings and organizational changes. Third, a carrier’s status as a CLEC has some significance in

other contexts. For example, recently filed settlement documents in the docket involving FairPoint's Wholesale Performance Plan (DT 11-061) are replete with references to FairPoint's obligations to "CLECs." The same applies to FairPoint's wholesale tariffs. In addition, MetroCast has a settlement agreement approved by the Commission in Order No. 24, 727 in docket DT 06-169 indicating that MetroCast must be a CLEC.

In short, some carriers can and should be considered both a CLEC and an ELEC, and nothing in either SB 48 or HB 542 requires that the CLEC or CTP designation be eliminated. Note that Puc 401.01 states that the purpose of the rules is to establish procedures, rules and guidelines for telephone utilities "in order to enable providers to comply with relevant statutes and commission orders." Because existing statutes and orders refer to CLECs and CTPs, elimination of those entities' status would likely create confusion and uncertainty regarding providers' rights and responsibilities under relevant statutes and orders. To avoid that result, the more prudent approach is to maintain CLECs' and CTPs' registrations and status when conferring the additional ELEC status created by SB 48.

Lastly, for the reasons presented above concerning the definition of "voice service" in Puc 402.23, the new ELEC authorizations provided to CLECs and CTPs should not be restricted to voice service. It should be noted that under RSA 374:22-p, I.(d), a "telecommunications service provider" that is not an incumbent local exchange provider ("ILEC") shall not be required to provide basic service. Basic service is defined in RSA 374:22-p, I.(b)(1) as including "[s]afe and reliable single-party, single line voice service". Thus, because CLECs and CTPs are not ILECs and are therefore not required

to provide basic service (a component of which includes “voice service”), it would be improper to restrict their authority to the provisioning of “voice service.”

Puc 404.02 Authorization Required to Provide Voice Service.

Puc 404.02(a) and (b). For the reasons discussed above, the word “voice” should be replaced with “telecommunications.” See NECTA Redlined Draft at 7.

Puc 404.02(c) and (d). (Process for obtaining authority to operate in a rural telephone company territory.) The wording of Puc 404.02 (c) indicates that as part of the process for approving a competitor’s request to operate in a rural telephone company’s (“RTC’s”) territory, the RTC can ask the Commission to adjudicate whether the applicant must meet the requirements of 47 U.S.C. 253 (f) relative to eligible telecommunications carrier (“ETC”) status. Section 404.02(d) permits the Commission’s authorization process to include this adjudicative proceeding based on an RTC request. NECTA objects to this burdensome adjudicatory process because it is contrary to the Supreme Court’s holding in *In Re Bretton Woods Telephone Co., Inc.*, 164 N.H. 379 (2012). In *Bretton Woods*, the Court found that no prior adjudication (*i.e.* notice and hearing) must be afforded to the RTC in order for the Commission to decide whether to grant a competitive carrier’s application to operate within the territory of an RTC. NECTA believes that, consistent with the *Bretton Woods* decision, the more appropriate approach for applications to operate in an RTC’s territory is for the Commission to grant the application unless it is denied for the reasons stated in 404.03 (*i.e.* the applicant has: 1) committed an act constituting good cause to find a rules violation; 2) had civil, criminal or regulatory penalties imposed for consumer protection violations within the last 10 years; 3) knowingly made a material false statement in the

application; or 4) demonstrated such flagrant or repeated violations of utility or competitive carrier requirements in other states that the Commission finds it is not in the public good to allow registration.) Once authorization is granted, the RTC would have the opportunity to request that the applicant meet the ETC requirements, and the Commission could consider that issue in a separate adjudicative proceeding. It is NECTA's position, consistent with the Supreme Court's holding in *Bretton Woods*, that the initial authorization should not include any ETC requirements, but that such requirements should be considered separately. While *Bretton Woods* contemplated that the Commission may address this issue via rulemaking, a proposed rule that adds an adjudicatory burden to the approval process is contrary to the decision itself. See NECTA Redlined Draft at 7-8.

Puc 404.03 Denial of Registration.

NECTA recommends including language at the end of this section that states that in determining whether to deny an application for registration, the Commission shall consider whether the acts specified in 404.03(a) were substantially related to the qualifications, functions or duties required to provide telecommunications services. See NECTA Redlined Draft at 8. The recommended language appeared in the Commission's prior telecommunications rules (see former rules Puc 431.02(b) and 451.02(b)) but was omitted from this draft.

Puc 404.04 Assessment.

For the reasons set forth above in response to Puc 402.10 "Gross utility revenue," NECTA recommends that this section be deleted in its entirety. See NECTA Redlined Draft at 8-9.

Puc 404.05 Tariff for Wholesale Services.

NECTA recommends including language that makes clear that telephone utilities having obligations to provide other carriers with intrastate access service, as well as services under 47 USC 251(c) and interconnection agreements, must maintain a complete tariff or tariffs of such services with the Commission. *See* NECTA Redlined Draft at 9.

Puc 404.06 Website.

NECTA recommends revising this section to conform to the statutory language of RSA 378:1-a (requiring ELECs to post rates, fares, charges, prices, terms and conditions of services provided to end users on the ELECs' publicly available website). *See* NECTA Redlined Draft at 9.

Puc 404.07 Accident Notifications.

NECTA recommends revising the provisions of this section to make clear that they apply only to ILECs who are not ELECs. *See* NECTA Redlined Draft at 9-10. NECTA agrees with the public hearing comments of the New Hampshire Telephone Association that the Commission's regulatory authority over ELECs' facilities is very limited and does not extend to requiring accident notifications.

Puc 405.02 Slamming Prohibited.

NECTA recommends revising this section to make the language consistent with the slamming statute, RSA 374:28-a, II, and to make clear that slamming does not include transfers of customer bases conducted in accordance with the Commission's rules. *See* NECTA Redlined Draft at 12-13.

Puc 405.03 Transfers of Customer Base.

NECTA objects to Puc 405.03 (a)(2) because the information sought is duplicative of that provided to the FCC under 47 CFR 64.1120(e). NECTA also recommends revising this section to make the obligations of acquiring carriers under state rules consistent with the requirements of federal rules. *See* NECTA Redlined Draft at 13.

Puc 405.04 Cramming Prohibited.

NECTA recommends deleting this section in its entirety. The prohibition against cramming contained in RSA 378:44 is aimed at billing aggregators and other service providers, not the public utility who performs the billing function for the aggregators and service providers. Thus, to the extent that draft rule 405.04(b) states that “telephone utilities shall not engage in cramming,” the rule is inconsistent with the cramming statute and therefore should be stricken from the draft rules. However, NECTA does not object to including a properly worded rule concerning cramming in the Commission’s consumer protection (1200) rules. *See* NECTA Redlined Draft at 13.

Puc 406.03 Significant Facility Disruption.

NECTA recommends revising the language of this section to be consistent with the FCC’s outage reporting requirements found at 47 CFR 4.9(f). *See* NECTA Redlined Draft at 14-15.

Puc 407.05 Carrier to Carrier Migrations.

NECTA recommends adding language from former rules Puc 418.06(d) and 437.06(d) which prohibits ELECs and ILECs from marketing to retain a customer as a result of receiving a request for a customer service record. *See* NECTA Redlined Draft at 16. This language is intended to prevent anti-competitive behavior, and is in line with the

intent of federal rules that prohibit the use of porting orders to engage in retention marketing.

Puc 407.06 Directories.

NECTA recommends language to make clear that ELECs and ILECs must permit requesting carriers to list the requesting carriers' customers' telephone numbers in the same directories in which the ELECs and ILECs cause their own customers' telephone numbers to be published, and that ELECs and ILECs shall not publish or list numbers for which other carriers have requested non-directory listed or non-published status. *See* NECTA Redlined Draft at 16-17.

Puc 408.01(b) and 409.03 (related to the filing of the T-2 Assessment Report).

For the reasons discussed above regarding Puc 402.10 "Gross utility revenue," NECTA recommends deleting all of the draft rule provisions relating to utility assessments. *See* NECTA Redlined Draft at 17 and 19.

Puc 409.04 Form T-4 Transfer of Customer Base Report.

For the reasons discussed above regarding Puc 405.03 "Transfers of Customer Base," NECTA recommends deleting all of the draft rule provisions relating to Form T-4. *See* NECTA Redlined Draft at 13, 17 and 20.

Puc 409.07 Form T-7 Exchange Eligibility Report.

NECTA recommends revising subsection (b) of this rule to make clear that the information to be provided on the form relates only to the exchange in which the ELEC has become eligible to provide service, not all the exchanges in which the ELEC was previously authorized to provide service. *See* NECTA Redlined Draft at 21.

Puc 409.08 Form T-8 Application for Registration to Provide Voice Service.

Consistent with comments above concerning the use of the word “voice service” in the rules, NECTA recommends deleting the word “voice” from the title and first sentence of Puc 409.08, and from Puc 409.08(d). *See* NECTA Redlined Draft at 22 and 23.

Puc 410.06 Conditional Interconnection Requirements.

RSA 362:8, III explicitly preserves obligations relating to the provision of services to CLECs and interexchange carriers. However, many of the Commission’s former rules that provided protections to interconnecting carriers have been omitted from the draft rules. For example the draft rules do not contain a provision that prohibits an ILEC from requiring physical collocation to achieve interconnection (former rule 421.01 (c)), or that require that interconnections provided by an ILEC have the same level of quality as that provided by the ILEC to itself (former rule 421.01(d)). Also missing is former rule 421.02 (a), which requires that interconnection be provided on a nondiscriminatory basis, and on terms and conditions no less favorable than those that the ILEC provides to itself. Other missing requirements include the obligations under former rules 421.02 (b) – (d) that a non-exempt ILEC must provide citations to necessary technical references; that it must not charge for the correction of code violations not resulting from a CLEC’s request to access poles, ducts, conduits or rights of way; and that it must file interconnection agreements with the Commission within 30 days.

Another important section from the former rules that is missing from this draft is section 440.03 dealing with the process by which a CLEC can seek redress from the Commission if the CLEC’s interconnection request is denied. NECTA believes that it is

important that all of the above-mentioned protective provisions of the former rules which were omitted from the draft rules be reinstated. While NECTA appreciates Staff's attempts to streamline the rules in light of retail service deregulation, the omitted rules afford wholesale protections to competitive carriers that were not eliminated or otherwise disrupted by SB 48 or HB 542. As such, they should be included in this draft. See NECTA Redlined Version at 26-27.

Conclusion

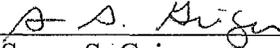
For the reasons set forth above, NECTA respectfully requests that the Commission include within the final proposed rules the suggested revisions contained in the attached redlined document. NECTA appreciates the opportunity to present these comments and looks forward to working with Commission Staff and other parties at the upcoming technical session to resolve outstanding issues.

Respectfully submitted,

**NEW ENGLAND CABLE AND
TELECOMMUNICATIONS
ASSOCIATION, INC.**

**By its attorneys,
Orr & Reno, P.A.**

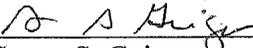
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Dated: November 7, 2013

Certificate of Service

I hereby certify that on this 7th day of November, 2013, a copy of the within Comments was sent by electronic or U.S. mail to persons named on the Service List in this docket.



Susan S. Geiger

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