

DT 00-294
DT 00-295

WILTON TELEPHONE COMPANY
HOLLIS TELEPHONE COMPANY

Investigation of Companies

Order on Motion for Rehearing

O R D E R N O. 23,790

September 28, 2001

I. INTRODUCTION

On July 26, 2001, the New Hampshire Public Utilities Commission issued a prehearing conference order, Order No. 23,744, in the above captioned case. The Order provided detail as to the procedural history of the docket, ruled on a procedural schedule for the case and made substantive findings regarding notice issues and the burden of proof in the case. As is statutorily permitted, Wilton Telephone Company and Hollis Telephone Company (the Companies) filed for rehearing on August 23, 2001. See NH RSA 541:3.

The Companies' motion for rehearing and suspension of the proceedings argued that Order No. 23,744 was unlawful and unreasonable in a number of areas. On August 29, 2001, the Staff of the Commission (Staff) submitted an objection to the motion for rehearing.

II. POSITION OF THE PARTIES

In its Motion for Rehearing, the Companies contend the Commission's order violated the law in five ways. First, the Companies complain that it appears the Commission made findings of fact in Section II of Order No. 23,744 in reciting allegations of non-compliance made by Commission Staff in two reports. Next, the Companies allege the decision to review prior Orders granting the Companies' franchises without regard to standards prescribed in RSA 374:28 is unlawful. The Companies also contend that the Commission's decisions with regard to burden of proof and notice are flawed. Finally, the Companies reassert their position regarding the continuation of this docket where the Commission may use findings of the docket as a basis for assessing fines. The Companies have challenged the constitutionality of the Commission's fining authority and contend that the Courts should decide the question prior to continuing the proceeding.

The Companies also request specific relief. For example, they request, among other remedies, that if the Commission denies the motion for rehearing it should suspend the Order pending the filing of an appeal with the Supreme Court. The Companies further request that Order No. 23,744 be rescinded

so a new procedural order can be established that better reflects the Companies' positions of previous filings.

Staff, in opposition to the Companies' motion, filed its objection arguing the motion is a "sweeping attack on the legality and reasonability of the order with no legal support for the criticism." Staff Opposition, paragraph 3. Staff addressed the various arguments and concluded the "Companies have not provided sufficient legal support to establish how the Commission mistakenly conceived its original decision. Anecdote alone is an inadequate standard on which the Commission should determine whether to grant a rehearing." *Id.*, paragraph 9.

III. COMMISSION ANALYSIS

"Upon review of any motion for rehearing, this Commission shall consider each and every ground that is claimed to be unlawful or unreasonable and grant the request if there is good reason." RSA 541:3, RSA 541:4. We therefore undertake an analysis of the Companies' arguments to determine if there are such grounds to grant the requested relief.

We find troubling the assertion that this Commission has prejudged the case and made findings of fact on the allegations of the December 22, 2000 Staff memorandum. In an effort to specify the various allegations of non-compliance we

diligently attempted to present the facts that constitute the alleged shortfalls of the Companies. Accordingly, Section II of Order No. 23,744, was a direct response to the Companies' earlier claim that the Commission had not afforded them a sufficient specification of charges.

At no time has this Commission prejudged the case in front of us. We were presented with allegations by our Staff and initiated a docket in response, as we are statutorily authorized to do. The Companies' motion and Staff's response, however, has prompted us to revisit Section II, which is entitled "Allegations of Non-Compliance." We believe inserting the word "allegedly" in the last sentence of the first paragraph in that section will alleviate any concern of the Companies. The sentence, as clarified, will now read, "The following provides areas in which the Companies allegedly did not comply or failed to fully comply."

Given the above discussion of specification of charges, we will now turn to the Companies' continued assertion that they have not been provided with adequate notice of the specifications against them. The Companies essentially rely on their previous arguments and restate their views that they have not been sufficiently apprised of the charges against them. We

disagree. In their motion at paragraph 4, the Companies discuss an issue relating to software replacement or upgrade. Staff concluded that the Companies had not fully complied with the requirement to upgrade or replace Company software. The Companies are aware of Staff's position and will have an opportunity to rebut the claim. Moreover, as we stated in Order No. 23,744, the Companies will have an opportunity to review Staff's testimony and conduct discovery on any issue raised in the case prior to asserting a defense. Accordingly, since the Companies have presented no arguments that compel a result different from that reached in our original order, we cannot grant rehearing on this ground.

Likewise, we are not convinced that rehearing is necessary given the Companies' belief that the Staff bears the burden of proof. In paragraph 6 of their motion, the Companies argue they are faced with a presumption of guilt. This case is not a criminal proceeding, it is an agency adjudication meant to determine whether telephone utilities have conformed to this agency's requirements. The Companies provide no legal precedent for their belief. Accordingly, there is no good reason to withdraw from our original analysis.

The Companies also challenge our analysis regarding the decision to proceed with the possible revocation of franchises. The Commission has the duty to assure that utilities are serving the public good. In exercising that authority the Commission may revoke or rescind a previous order, after procedural safeguards are met, if circumstances warrant such an action. RSA 365:28. We fail to find the Companies' argument persuasive with regard to franchise and property rights. Property rights may be taken away where the appropriate procedural safeguards are met. Our order merely represented to the Companies the set of potential outcomes that might be exercised in this case. This Commission has given no indication of a likely result of the proceeding. We believe it is not unreasonable to proceed in the manner outlined in Order No. 23,744.

As a remedy, the Companies ask that the docket be stayed while they seek recourse to the Supreme Court. We see no basis for an interlocutory appeal. The issues presented by the motion for rehearing are not ripe for such adjudication. Moreover, we do not believe the harm alleged by the Companies is currently tangible. We acknowledge, however, that the Companies may avail themselves of available appellate rights at

any time, but we believe the continued progress of the docket will not unjustly burden the Companies.

Lastly, we address the Companies' interpretation of the Commission's ruling with regard to fines. Our order did not determine that fines were not within the scope of this Docket. We found merely that we did not need to address the Companies' arguments with regard to the constitutionality of our fining authority at this point in the administrative case. Only after a review of the evidence is completed could this Commission determine the appropriate remedy. The Companies continue to argue it is unreasonable and unlawful for the Commission to utilize findings in the docket as a basis for assessing fines. We believe the appropriate time to address this issue is once all the evidence is presented to us. We continue to decline to address the Companies' constitutional claims, but we would urge the Company to consider the Supreme Court case of *Atlas Roofing Co. v. Occupational Safety and Health Commission*, 430 US 442, 97 S.Ct. 1261, 51, L.Ed.2d. 464 (1977)(interpreting 7th Amendment in administrative setting). In that case the Court held that a trial by jury is incompatible with an administrative forum. The Court indicated that Congress could create new public rights and

remedies by statute and commit their enforcement to a tribunal other than a court of law.

As an additional matter, we consider the procedural schedule for the docket, as we understand it has been suspended by agreement of the Parties. In order for the case to move forward as expeditiously as possible we need to rework the procedural schedule previously established. We will, therefore, use the schedule addressed in Order No. 23,744 and modify it by adding 30 days to all dates starting with the deadline for filing Staff testimony. Accordingly, Staff testimony will be due on October 3, 2001; Data Requests to Staff will be due on October 17, 2001; and so on. Hearings will be scheduled for January 22 and 23, 2002.

Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing is DENIED in part; clarification is provided as indicated herein.

DT 00-294
DT 00-295

9

By order of the Public Utilities Commission of New
Hampshire this twenty-eighth day of September, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary

DT 00-294
DT 00-295