

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 08-013**

**COMCAST PHONE OF NEW HAMPSHIRE**

**Application for Authority to Serve Customers**

**in the TDS Service Territories**

**Order Granting Authority**

**ORDER NO. 24,938**

**February 6, 2009**

**APPEARANCES:** Mintz Levin by Cameron F. Kerry, Esq. for Comcast Phone of New Hampshire, LLC; Devine Millimet & Branch by Frederick J. Coolbroth, Esq. and Patrick C. McHugh, Esq. for New Hampshire Telephone Association and the TDS Companies; Rothfelder Stern, LLC by Martin C. Rothfelder, Esq. for Union Telephone Company d/b/a Union Communications; Office of the Consumer Advocate by Meredith A. Hatfield, Esq. on behalf of residential ratepayers; and F. Anne Ross, Esq. of the Staff of the Public Utilities Commission.

**I. PROCEDURAL HISTORY**

On December 12, 2007, Comcast Phone of New Hampshire (“Comcast”) filed an application for authority to provide local exchange telecommunications services pursuant to RSA 374:22 and to do business as a competitive local exchange carrier (“CLEC”) in the service territories of three affiliated incumbent local exchange carriers (ILECs) – Kearsarge Telephone Company (KTC), Merrimack County Telephone Company (MCT) and Wilton Telephone Company (WTC) – all subsidiaries of TDS Telecom (collectively, the TDS Companies or TDS). Comcast completed the required attachments to its CLEC application on January 22, 2008. Comcast is a CLEC currently authorized to provide intrastate telecommunications services in the New Hampshire exchanges formerly served by Verizon and now served by Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint).

On April 4, 2008, the Commission issued Order No. 24,843 on a *nisi* basis, granting Comcast's application for authority effective May 5, 2008, unless any interested party filed comments or requested a hearing. On April 16, 2008, the TDS Companies filed a motion to suspend Order No. 24,843 pending resolution of Docket No. DT 07-027,<sup>1</sup> or alternatively for a hearing. On April 21, 2008, the New Hampshire Telephone Association (NHTA) filed an objection to Order No. 24,843 and requested a hearing. Comcast filed an objection to the TDS motion and a response to the NHTA objection on April 30 and May 2, 2008, respectively.

On May 2, 2008, the Commission issued Order No. 24,854 suspending the order *nisi* and scheduling a prehearing conference. Following that order, the TDS Companies, NHTA and Union Telephone Company filed petitions to intervene. On May 20, 2008, the Office of Consumer Advocate entered an appearance on behalf of residential ratepayers pursuant to RSA 363:28. On May 21, 2008, the prehearing conference was held as noticed and the Commission granted all petitions to intervene. Following the prehearing conference, the parties and Staff met in a technical session and agreed to a procedural schedule including discovery, an additional technical session to develop stipulated facts, and written briefs. The Commission approved the proposed schedule on June 11, 2008.

On June 18, 2008, Staff filed a letter attaching stipulated facts, which the parties agreed would provide a basis for briefs. On June 26, 2008, NHTA, MCT and KTC, (Joint ILECs) filed a joint brief; Union also filed a brief. Comcast filed its brief on June 27, 2008. On July 14, 2008, the Joint ILECs filed a reply letter and the OCA filed a response to the Joint ILEC brief. Comcast filed a reply brief on July 15, 2008.

SegTEL, Inc. filed a motion to intervene on July 22, 2008, and stated that it would accept the process where it was and would not delay the proceedings. On August 18, 2008, the

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<sup>1</sup> Docket DT 07-027 involved the TDS Companies' petition for alternative regulation pursuant to RSA 374:3-b.

Commission issued Order No. 24,887 granting segTEL's petition to intervene and scheduling a hearing for September 22, 2008. The Commission also directed the parties to file testimony and briefs regarding the remaining unresolved issue to be decided in this docket: whether granting Comcast Phone's CLEC application is consistent with the public good pursuant to RSA 374:22, RSA 374:22-g and RSA 374:26. The Joint ILECs filed written testimony on September 9, 2008 and Comcast filed testimony on September 10, 2008. By Secretarial Letter dated September 22, 2008, the Commission accepted the parties' recommendation to resolve the matter by briefs, entered the prefiled testimony into the record, and canceled the hearing. NHTA, Union and Comcast filed initial briefs. The Joint ILECs filed a joint reply brief on October 10, 2008, and Union and Comcast filed reply briefs on October 14, 2008.

On January 22, 2009, the NHTA, MCT and KTC filed a joint motion to supplement the record, seeking to introduce a letter from the General Counsel of the Wireline Competition Bureau of the Federal Communications Commission (FCC) to Comcast asking Comcast to explain why its VoIP (Voice over Internet Protocol) offering should not be treated as a telecommunications service. Comcast responded on January 26, 2009 that it does not oppose the motion so long as its answer to the FCC is included in the record as well. On February 4, 2009, Comcast filed its answer to the FCC.

## **II. POSITIONS OF THE PARTIES**

### **1. Comcast Phone**

#### **A. Testimony**

Comcast provided testimony by David Kowolenko, Vice President of Voice Services, and Michael D. Pelcovits, Ph.D., an independent consultant. Mr. Kowolenko testified as to Comcast's managerial, financial and technical ability to provide competitive local exchange

services in the TDS Companies' service territories. Mr. Kowolenko stated that Comcast has operated as a CLEC since 1998 in the FairPoint (formerly Verizon) service territory in New Hampshire. Mr. Kowolenko pointed out that Comcast offers the same business, and schools and libraries network services described in its CLEC application in the FairPoint service territory. Mr. Kowolenko also described the local interconnection service provided by Comcast to an affiliate, Comcast IP Phone II, LLC (Comcast IP), in the FairPoint service territory; a service which will also be offered in the TDS service territories.

According to Mr. Kowolenko, Comcast currently serves as a CLEC in Maine, Vermont, Massachusetts, New York and more than thirty other states and offers services similar to those described in its CLEC application, and already offered in the FairPoint service territory. Comcast will utilize the same experienced management and technical staff to conduct its business in the TDS service territories as it currently uses in the FairPoint service territory.

Mr. Kowolenko referenced the annual report for 2007 for the Comcast parent company, Comcast Corporation, and stated that Comcast Corporation is a publicly held company with \$30 billion in annual revenues and \$2.5 billion in annual net income. In addition, Mr. Kowolenko stated that Comcast has invested \$110 million to upgrade and expand its fiber network in New Hampshire.

Regarding the TDS Companies' ability to recover expenses they incur as a result of Comcast's entry into their service territories, Mr. Kowolenko explained that Comcast does not require the use of TDS's unbundled network elements to provide services. As a result, Comcast needs an interconnection agreement to provide for the mutual exchange of traffic. According to Mr. Kowolenko, the parties are in the process of negotiating an interconnection agreement for New Hampshire. Mr. Kowolenko stated that the New Hampshire interconnection agreement will

be modeled after the one reached between TDS and Comcast in Vermont in 2008 and noted that Comcast is also in the process of negotiating interconnection agreements with TDS in Georgia, Michigan and Washington.

Mr. Kowolenko indicated that Comcast has long offered video services and broadband internet services to customers in the TDS service territory. Mr. Kowolenko stated that TDS already offers video service through Dish Network Satellite TV and broadband access to its customers in competition with Comcast's video and broadband offerings.

Dr. Pelcovits began by observing that New Hampshire explicitly recognizes the benefits of competition, "[c]ompetitive markets generally encourage greater efficiency, lower prices, and more consumer choice. It is the policy of the state of New Hampshire 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. Laws 147:1. According to Dr. Pelcovits, competition compels firms to produce goods as efficiently as possible and encourages innovation, new services and new technologies.

Dr. Pelcovits observed that for a number of years following the 1996 Telecom Act<sup>2</sup> unbundled network elements (UNEs) formed the basis of most competitive services, but more recently cable providers have taken the leading competitive role. According to Dr. Pelcovits, over the past ten years cable companies have invested over \$100 billion in infrastructure and are now capable of providing broadband, and in most cases IP-voice service, to over 117.7 million homes in the United States.

Dr. Pelcovitz observed that competition has been slow to develop in the TDS territories because of regulatory and other barriers to entry. With the passage of SB 386 in July, 2008, the legislature removed the barrier posed by RSA 374:22-f and stated a clear preference for

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<sup>2</sup> 47 U.S.C. § 251 et seq.

competition in the small ILEC service territories in New Hampshire. He claimed that granting Comcast's CLEC application will not only extend competition for businesses, schools and libraries, but will also extend competition to additional markets since Comcast would be free to introduce other forms of local exchange service, exchange access and interexchange services. Finally, Dr. Pelcovitz pointed out that granting Comcast's CLEC application reduces barriers to Comcast IP's participation in the TDS territories and therefore contributes to the public good.

Dr. Pelcovitz claimed, based on a 2007 nationwide study he conducted, in which he attempted to quantify the customer savings, that cable voice competition brings consumer benefits of \$100 billion over a five year period. He explained that approval of Comcast's application would eventually enable Comcast to offer triple play, video, data and phone service as a bundled offering, to compete with the triple play product currently offered by TDS.

As to the effect of competition on TDS, Dr. Pelcovitz explained that competition will force inefficient ILECs to reduce price levels to economic costs and will prevent the recovery of excessive costs. On the other hand, competitors will not price below their own long-run costs and therefore will not drive prices below those of an equally or more efficient ILEC. Thus, to the extent that TDS is currently recovering costs in excess of economic costs, competition could over time reduce TDS's cost recovery to economic costs.

Dr. Pelcovitz claimed that there is no reason to think that TDS's ability to offer universal service or serve as carrier of last resort will be harmed by Comcast's entry into the market. He pointed to TDS's testimony in a recent docket in which the TDS witness, Michael Reed, stated that TDS could continue to serve as carrier of last resort despite significant existing and

increasing competition in its service territories.<sup>3</sup> In addition, Dr. Pelcovitz referred to the TDS Companies receipt of \$2.4 million in Federal high cost support in 2007 and pointed out that such funds are designed to assist the TDS companies in providing universal service by offsetting the embedded cost of local switching and common line plant.

Dr. Pelcovitz stated the costs that the TDS Companies will incur to serve Comcast are limited to interconnection costs. Interconnection costs are the costs of the physical exchange of traffic from one carrier to another. The 1996 Telecom Act requires ILECs to terminate calls to their own customers originating on a competitor's network. According to Dr. Pelcovitz, the cost of terminating traffic consists of the incremental cost of interoffice transport and local switch terminating usage. Under the 1996 Telecom Act, the TDS Companies are entitled to recover the forward looking economic costs of transport and termination provided to interconnecting CLECs.<sup>4</sup> Likewise the CLEC is entitled to recover its own costs of terminating traffic originating on the TDS Companies' network. The interconnection agreement between Comcast and the TDS Companies should include negotiated cost-based interconnection fees.

### **B. Brief**

Comcast asserts that it is beyond dispute under New Hampshire public policy, as well as basic economic principles, that competition in local telecommunications is for the public good. Comcast claims that its application advances the state policy encouraging competition and meets statutory and regulatory standards. Comcast alleges that the Commission's own rules "provide an appropriate balance between the interests of incumbent telecommunications providers and those of competitive entrants." *See*, N.H. Code of Admin. Rules Puc 431.01 and 431.02.

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<sup>3</sup> Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc., and Merrimack Telephone Company Petition for an Alternative Form of Regulation, DT 07-027, Direct Testimony of Michael C. Reed, at 10 (filed March 1, 2007).

<sup>4</sup> 47 CCR § 51.505

Comcast suggests that Commission rules require that the Commission “shall” issue a CLEC authorization unless the applicant is denied based upon one of the acts or omissions enumerated in Puc 431.02. Comcast argues that the burden is on the ILEC to show evidence why its application should not be granted, and that in this case no such evidence was established.

In addition, Comcast indicates that its entry into the TDS Companies’ territories will benefit New Hampshire consumers by bringing competition to the telecommunications services it proposes to offer, including services to small businesses and schools and libraries. In addition, the wholesale communications services provided by Comcast would enable Comcast IP to serve New Hampshire residential customers with VoIP service, offering consumers another alternative in residential voice communications. Comcast states that approval of its application would promote lower prices, better service and broader consumer choice within the TDS Companies’ service territories.

Finally, Comcast emphasizes that to place conditions on its CLEC application regarding the services it could offer, as the TDS Companies suggest, would be inconsistent with state and federal law and policy, by requiring Comcast to seek further Commission approval in order to offer other competitive services. Moreover, Comcast states, under Puc 431.06 CLECs are free to introduce additional services as the market demands, without prior notice to, or review by, the Commission. Comcast contends that any such conditions would create a troubling precedent and delay or upset the well-established streamlined CLEC entry process contained in Puc 431.01 and 431.02.

Comcast argues that there is no basis in New Hampshire law to treat Comcast differently from any other CLEC and that the Commission has not previously inquired into the business plan of a CLEC applicant beyond the information required on the application. As a matter of



fact, this unprecedented proceeding is the first time on record that the Commission has allowed incumbent carriers to prompt a hearing on entry of a CLEC.

### **C. Reply Brief**

In its reply brief, Comcast reiterates that granting its CLEC application is for the public good. Comcast alleges that it has submitted far more information and evidence to support its application than has ever been required of any other CLEC applicant in New Hampshire, and that such evidence meets its burden of proof. Comcast also reiterates its claim that the burden is on incumbent carriers to present evidence to show why the application should not be approved. Comcast claims that to hold it to a different, higher standard, impose unprecedented conditions, or undertake additional proceedings would further delay competitive entry, to the sole benefit of the incumbent.

Additionally, Comcast argues that questions regarding appropriate regulatory treatment of VoIP services or new rules for “fair and equitable competition” are outside the scope of this proceeding. Comcast maintains that the ILECs are free at any time to petition the appropriate authority to address such issues without holding Comcast’s CLEC application hostage. According to Comcast, there are no bases in statutes or regulations for the Commission to impose conditions and limitations on the services Comcast is allowed to offer. Comcast urged the Commission to find that approval of Comcast’s CLEC-10 petition is for the public good.

## **2. NHTA, MCT and KTC**

### **A. Testimony**

The Joint ILECs submitted the testimony of Ms. Valerie Wimer, an independent consultant on telecommunications issues. Ms. Wimer testified that, absent Commission action to address the regulatory treatment of Comcast’s VoIP service, competition from such VoIP

services would be skewed heavily in Comcast's favor and would not be fair competition. Ms. Wimer also stated that the Commission should not allow Comcast to operate in the TDS service territories without first determining the appropriate regulatory treatment of the Comcast VoIP service. Ms. Wimer took the position that the Commission must determine whether both the retail and the wholesale services to be provided for Comcast VoIP, are in the public good. Further, Ms. Wimer pointed out that pricing rules, reporting rules and consumer protection rules all favor Comcast over the TDS Companies. Although Ms. Wimer acknowledged that alternative regulation provides some improvement over rate of return regulation for the TDS Companies, she asserted that alternative regulation does not match the regulatory freedom provided to Comcast. Ms. Wimer stated that Comcast is not required to offer equal access to all inter-exchange carriers, nor to offer lifeline and link-up services, all of which are required of the TDS Companies.

Ms. Wimer claimed that whenever the TDS Companies lose customers there will be a negative economic impact. Further Ms. Wimer stated that whenever business customers leave a rural telephone carrier's efficiency decreases and the cost per customer increases. Ms. Wimer acknowledged that some costs are saved when a customer leaves a rural ILEC, but she noted that carrier of last resort obligations require carriers to remain available to serve all customers in the franchise area.

According to Ms. Wimer, the VoIP service to be offered by the Comcast affiliate is in regulatory limbo due to the FCC's failure to classify VoIP service as either a telecommunications or an information service. Further, Ms. Wimer claimed that the wholesale interconnection service Comcast proposes to offer to its VoIP affiliate is not classified as either telecommunications or information services.

Ms. Wimer asserted that the Commission is not preempted by federal statute or the FCC from determining whether intralata services, both retail and wholesale, are telecommunications services. Ms. Wimer claimed that both Missouri and Vermont have undertaken an examination of VoIP services. Ms. Wimer urged the Commission to open a docket to determine whether Comcast's VoIP services are telecommunications or information services.

Ms. Wimer pointed out that only revenue from Comcast's retail service and its wholesale service would be reported and subject to utility assessment, while the revenue from Comcast's VoIP service would escape both regulation and assessment.

Ms. Wimer recommended that the Commission limit its approval of Comcast's CLEC application to those retail services specifically listed, i.e. business local service and schools and libraries exchange service. Ms. Wimer further suggested that the Commission not require the TDS Companies to provide any porting or interconnection services until Comcast wins a schools and libraries customer.

## **B. Brief**

The Joint ILECs argued that Comcast's CLEC-10 application fails to disclose the actual services it will provide and does not define the terms "access" "exchange access" and "interexchange service." The Joint ILECs contended that Comcast plans to offer "Business Local Service" at a rate of \$66.25 per month per access line, a rate well above rates charged by ILECs operating in New Hampshire. The Joint ILECs stated that Comcast plans to provide resold business local service and schools and libraries network service and that Comcast also intends to provide its digital voice product through Comcast IP Phone II, LLC. The Joint ILECs alleged that testimony shows that Comcast phone provides Comcast IP local interconnection service.

The Joint ILECs asserted that Comcast's request does not meet fairness criteria because the regulatory burden on the TDS Companies does not permit them to compete fairly with an unregulated Comcast. The Joint ILECs claimed that Comcast's CLEC application is intended to facilitate the provisioning of the VoIP products to residential customers who live within the TDS Companies' service territories. The Joint ILECs contended that the Comcast petition is not for the public good. The Joint ILECs suggested that if the Commission grants Comcast's CLEC application it should limit approval to business local service and schools and libraries exchange service.

The Joint ILECs argued that Comcast bears the burden of proving that its application is complete and that the requested relief is for the public good. The Joint ILECs maintained that, in determining the public good, the Commission must consider all of the factors set out in RSA 374:22-g. According to the Joint ILECs, Comcast cannot prove that its entry into the TDS service territory would promote free and fair competition considering each of these conditions. The Joint ILECs contended that Comcast's testimony regarding facts and circumstances in Vermont has no relevance to this proceeding.

The Joint ILECs further asserted that pricing rules, reporting rules and other regulatory requirements disadvantage KTC and MCT when trying to compete with a completely unregulated entity. The Joint ILECs claimed that the regulatory playing field would be skewed under Comcast Phone's plan to provide its VoIP product, while requiring KTC and MCT, but not Comcast Phone, to adhere to all of the regulations which benefit consumers. Meanwhile, universal service and carrier of last resort obligations require that KTC and MCT must continue to provide service to all customer locations. According to the Joint ILECs, Comcast is not required to offer equal access to all inter-exchange carriers (IXCs) for toll service which, even

under alternative regulation, MCT and KTC are required to provide. Also, MCT and KTC are required to provide Lifeline and Link-up services. The Joint ILECs concluded that granting Comcast Phone's CLEC application is not in the public good. The Joint ILECs claimed that absent the Commission providing a level regulatory playing field and allowing fair competition, the Comcast proposal will not be fair, promote efficiency, promote universal service, nor allow the ILEC to obtain a reasonable rate of return.

### **C. Reply Brief**

The Joint ILECs addressed two questions: (1) do the Commission's rules for submission of a CLEC-10 Application lessen Comcast Phone's burden of establishing that its services serve the public good; and (2) is the evidence proffered by Comcast Phone sufficient to meet its burden of proving that approval of its CLEC-10 application is in the public good?

The Joint ILECs contended that Comcast's narrow interpretation of Commission rules that entry of a CLEC into the territory of an incumbent carrier serves the public good, and that the simple registration process adopted by the rules forestalls further adjudicative hearings, would reduce the Commission's broad statutory power to regulate telephone services to merely a rubber-stamping procedure and would undermine the governing statutes. The Joint ILECs argued that the plain language of RSA 374:26 and 374:22-g mandating the fostering of free and fair competition cannot simply be relegated to a rubber-stamping process. Comcast must be held to its burden of establishing that its services are for the public good.

The Joint ILECs also allege that the evidence proffered by Comcast is not sufficient to establish that approval of its application is in the public good. The Joint ILECs maintain that Comcast has not satisfied the six factors identified in RSA 374:22-g. The Joint ILECs argue that RSA 374:26 authorizes the Commission to grant a CLEC-10 application only if it is for the

public good, "and not otherwise" and that the Commission may prescribe such terms and conditions for the exercise of the privilege granted as it deems for the public interest. The Joint ILECs maintained that they proffered reasonable and appropriate conditions for the granting of Comcast's CLEC-10 application; however, the Joint ILECs held that Comcast has failed to meet its burden of proving that expansion into the TDS Companies service territories is for the public good.

### **3. Union Telephone**

#### **A. Brief**

Union contended that Comcast did not provide sufficient evidence regarding the incumbent utilities' opportunity to realize a reasonable return on its investment, carrier of last resort obligations, and universal service. Therefore, Union argues that Comcast's application does not comply with RSA 374:22-g and, as a matter of law, the Commission cannot find such authorization to be in the public good. Union suggests that Comcast failed to provide any facts or evidence specific to the TDS Companies' ability to earn a reasonable return. Union also contends that Comcast's application failed to address statutory requirements showing how universal service and carrier of last resort obligations will be impacted in the TDS Companies' territories. Union concludes that, due to the lack of credible evidence, the Commission must deny Comcast's petition.

#### **B. Reply Brief**

In its reply brief, Union reiterated that the evidence offered by Comcast in its CLEC-10 application is insufficient for the Commission to grant its application inasmuch as New Hampshire law requires the Commission to make findings on whether granting the requested authority is in the public good based on evidence on competition and six additional factors.

Union asserted that Comcast mischaracterized aspects of this case, asked the Commission to grant authority without meeting the basic requirements of the law, and misstated the burden of proof. Although Comcast made statements in its brief regarding the TDS Companies' opportunity to realize a reasonable return on their investment, Union contended that Comcast simply provided no evidence to support such statements. Union asserted that Comcast cannot simply assume facts, and the Commission must reject Comcast's attempt to make an argument regarding the TDS Companies' opportunity to earn. Likewise, according to Union, Comcast's claim that universal service support is "ample" is not supported by evidence or explanation as to how granting the requested authority would actually impact universal service or carrier of last resort obligations.

Union also argued that the requirement of fairness is not supported by the evidence in this case. Both constitutional and statutory requirements regarding competition explicitly require fairness. Comcast is an unregulated utility petitioning the Commission to provide regulated services. The highly disparate regulatory treatment between incumbent utilities and Comcast disadvantages the incumbents when trying to compete. Union alleged that Comcast presented no evidence and made no reasonable argument that this disparate regulatory treatment is fair, but instead claimed it is irrelevant. Union concluded that the Commission must deny Comcast's requested authority.

### **III. COMMISSION ANALYSIS**

#### **A. Statutory Standards for Granting Comcast Authority to Operate**

When Comcast filed its application for authority to operate as a CLEC in the TDS Companies' service territories the legislature had not yet amended RSA 374:22-f and 374:22-g to make clear that telephone franchises are not exclusive in New Hampshire and to bring the New

Hampshire statutes in line with the federal regime. *See*, 47 U.S.C. §§ 251 et seq. (1996 Telecom Act).

The 1996 Telecom Act established a framework of rights and obligations for telecommunications carriers in order to promote competition for local exchange service. Under the 1996 Telecom Act, telecommunications carriers, including both ILECs (TDS Companies) and CLECs (Comcast) have the obligation to interconnect either directly or indirectly with the facilities and equipment of all other carriers. *See*, 47 U.S.C. § 251 (a). Local exchange carriers, including ILECs (TDS Companies) and CLECs (Comcast), also have duties to allow resale of services, to port telephone numbers to other carriers, to provide dialing parity, to afford access to rights of ways and to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *See*, 47 U.S.C. § 251 (b). Finally, ILECs have additional duties, including among others, providing competitors with access to certain unbundled network elements (UNEs) and allowing competitors to collocate within ILEC facilities for the purpose of interconnection. *See*, 47 U.S.C. § 251 (c). Certain rural ILECs, like the TDS Companies, are exempt from 251 (c) obligations, including UNEs and collocation, until their exemption from these requirements is terminated as a result of a bona fide request from a carrier. *See*, 47 U.S.C. § 251 (f).

In addition to allowing the development of competition for local exchange services the 1996 Telecom Act prohibits states from taking any actions which create barriers to competitive entry into the telecommunications markets.

“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.” 47 U.S.C. § 253 (a)



By repealing RSA 374:22-f, which prohibited telephone utilities from competing in territories with fewer than 25,000 access lines, the New Hampshire Legislature removed a barrier to entry into those service territories. Further, by amending RSA 374:22-g so that it applies to all telephone service territories, regardless of size, the Legislature made clear that the Commission must consider the same factors whenever additional carriers wish to enter a service territory. RSA 374:22-g begins with the words, “[t]o the extent consistent with federal laws and notwithstanding any other provision of law to the contrary...” Clearly, the Legislature intends that the Commission’s application of RSA 374:22-g be guided by the federal laws and override any conflicting state laws.

Without the statutory amendments of RSA 374:22-f and RSA 374:22-g, which did not exist when Comcast first filed its CLEC application, the Commission considered Comcast’s CLEC application under the more general franchise statutes, RSA 374:22 and RSA 374:26. RSA 374:26 provides for a hearing in cases where any party opposes the franchise application. As a result, requests for a hearing in this case were granted. Given the recent amendments to RSA 374:22-f and 374:22-g, however, our decision in this case will be guided by the standard set out in RSA 374:22-g.

Pursuant to RSA 374:22-g, we must determine whether granting Comcast’s application fulfills the interests of competition together with: (1) fairness; (2) economic efficiency; (3) universal service; (4) carrier of last resort obligations; (5) the incumbent utility's opportunity to realize a reasonable return on its investment; and (6) 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 expenses.

## **B. Burden of Proof**

Before beginning our analysis of Comcast's CLEC application, we address arguments concerning the burden of proof. Our rules require the moving party, in this case Comcast, to "bear the burden of proving the truth of any factual proposition by a preponderance of the evidence." N.H. Code of Admin. Rules Puc 203.25. As fact finder, the Commission must weigh the evidence in the record before it to determine whether factual propositions have been proved. In this case, the factors identified in RSA 374:22-g involve the development of a competitive telecommunications market. We note that certain company specific information concerning the potential impact of a competitive market on ILECs is known only by the ILECs. Comcast bears the burden of producing evidence reasonably available to it and the TDS Companies bear the burden of producing evidence which is in their exclusive control. We will weigh the testimony and briefs submitted by all parties to determine whether the factors outlined in RSA 374:22-g have been satisfied by a preponderance of the evidence, recognizing that the parties agreed to forego a hearing in this matter.

## **C. Competition and Fairness**

Comcast requests permission to offer telephone and other services in competition with the TDS Companies in their service territories. Comcast, through its expert witness, presented evidence of the benefits of competition to consumers. We agree that competitive markets, which are favored by both federal and state statutes, generally encourage greater efficiency, lower prices and more consumer choice.

Although they acknowledge that Comcast will introduce competition, the ILECs argue that Comcast's offering of a VoIP service through an affiliate company is not fair because such a service will compete with local phone service, but will not be regulated. The regulatory

treatment of VoIP service has not been determined and, as we have stated previously, is beyond the scope of this proceeding. Currently, other competitive providers, including a TDS affiliate, offer unregulated cellular telephone services that compete with local exchange service in the TDS service territory. Such cellular telephone service is not subject to regulation or any of the consumer protections provided by our rules. The TDS Companies also currently offer bundled triple play services which combine unregulated video and high speed data services with telephone service. We do not find TDS offerings of bundled regulated and unregulated services unfair. Nor do we find Comcast's proposal to offer both regulated and unregulated services in the TDS service territories unfair. In making this finding, we do not assume that the Comcast VoIP service is either regulated or unregulated. We have authorized CLECs to operate throughout the FairPoint service territory in New Hampshire. Many of those CLECs, either directly or through affiliates, offer a variety of services with varying degrees of regulation, including cellular phone service, intralata and interlata toll service, video service, high speed data service and VoIP services. These competitive offerings are consistent with the state and federal policies we are bound to promote and are not unfair to the ILECs.

In this case, the TDS companies maintain that Comcast's VoIP services should be regulated and we have already found that question to be beyond the scope of the Comcast CLEC application. Whether or not those VoIP services are regulated does not impact the fairness of Comcast's entry into the TDS Companies' territories, because we have found that both regulated and unregulated services already contribute to the competitive market in the TDS Companies' service territories. We further note that neither the inquiry from the FCC's Wireline Competition Bureau, nor Comcast's answer, provide a basis for concluding otherwise. We find the

competition proposed by Comcast to be fair and the ILECs have not presented sufficient evidence to rebut that finding.

#### **D. Competition and Economic Efficiency**

As a state and national policy competition in telecommunications services is encouraged. Policy makers have chosen that policy because they believe it leads to economic efficiency. Comcast's expert witness presented evidence, on a national level, of the savings created by competition in telecommunications services. Such customer savings support the conclusion that services are being provided at lower costs and thus more efficiently.

In testimony, the ILECs claimed that if business customers left the TDS Companies there would be a negative economic impact and the carrier's efficiency would be reduced. On the other hand, Comcast's testimony indicated that competition fosters economic efficiency and prevents carriers from charging prices in excess of economic costs. The only thing which distinguishes this CLEC application from the numerous others we have approved is that in this case the ILEC whose service territory is being entered is subject to the rural exemption under the federal statute. *See*, 47 U.S.C. § 251 (f). We find no indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry. In fact, 47 U.S.C. § 251 (b) makes clear that all LECs must interconnect with other carriers operating in their service territory. The recent amendments to RSA 374:22-f and RSA 374:22-g make New Hampshire law consistent with federal law on this point. As a result, small ILECs in New Hampshire must not erect barriers to competitive entry and the CLEC approval process should not become a barrier to competitive entry.

One of the ways to achieve economic efficiency is by eliminating barriers to entry. In fact, the 1996 Telecom Act specifically prohibits states from creating barriers to the entry of

competition.<sup>5</sup> In an effort to support this important policy goal and to comply with federal statutes, the Commission's rules provide for a streamlined and efficient process for competitors to enter the local telecommunications market. See, N.H. Code of Admin. Rules Puc 431.01.

#### **E. Competition, Universal Service and Carrier of Last Resort Obligations**

CLECs in New Hampshire are not required to serve all customers in the service territories in which they operate. ILECs, on the other hand, are required to be the carrier of last resort and to provide service to all customers in their service territories. Under the current federal statutory scheme, ILECs are compensated for this service obligation through the universal service fund (USF). See, 47 U.S.C. § 254. Comcast points out in its testimony that the TDS Companies received a total of \$2.5 Million in federal high cost USF support in 2007 and that this support is designed to support TDS's universal service obligations. Although Union argued that Comcast has not presented evidence supporting the TDS Companies' ability to meet universal service obligations, Comcast has produced evidence of the federal universal service fund support of those obligations. The TDS Companies have not presented evidence demonstrating that competition will prevent them from meeting those obligations. Based on the record before us, we find that Comcast's entry into the TDS Companies service territories will not prevent them from meeting universal service and carrier of last resort obligations.

#### **F. Competition and the ILEC's Opportunity to Realize a Reasonable Return on its Investment**

Whether or not competition from Comcast would adversely impact the TDS Companies' ability to earn a reasonable return can be judged only by monitoring the TDS Companies' performance after Comcast actually begins operating in their territories. At this point, the analysis is, at best, speculative. The TDS Companies have not argued that their return on

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<sup>5</sup> 47 U.S.C. § 253.

investment will be unreasonable as a result of competition. Instead, TDS witness Wimer testified that if business customers leave a small ILEC, the carrier's efficiency is reduced and its cost per customer increases. While acknowledging that loss of a customer saves some costs, Ms. Wimer testified that carrier of last resort obligations require ILECs to remain ready to serve those lost customers. Ms. Wimer's testimony falls short of indicating any impact on TDS Companies' return on investment and such information is in the exclusive control of the TDS Companies. Further, as noted above, federal USF support is designed to support such obligations and should increase investment return. USF support to the ILEC continues even in a competitive market and provides protection against reduced return on investment.

Based on the record before us, we do not find that competition from Comcast will adversely impact the TDS Companies' opportunity to realize a reasonable return on its investment. Accordingly, we find that the interests of competition are not outweighed by the risk that the TDS Companies may not maintain their opportunity to earn a reasonable return on investment.

**G. Competition and the Recovery from Competitive Providers of Expenses  
Incurred by the Incumbent Utility to Benefit CLECs**

The TDS Companies are currently subject to the rural exemption and are therefore not required to unbundle network elements to competitors. The TDS Companies are, however, required to provide interconnection to Comcast. Interconnection consists of the physical exchange of traffic between carriers. TDS will incur the cost of terminating traffic from its customers to Comcast customers and will be reimbursed for terminating calls from Comcast customers to TDS customers. These costs will be negotiated between Comcast and the TDS Companies and included in an interconnection agreement.

Comcast and the TDS Companies are in the process of negotiating an interconnection agreement in New Hampshire and, according to Comcast, are negotiating similar agreements in several other states. It is reasonable to assume that the TDS Companies will set the terms of these agreements to recover their costs. In the event any carrier requests that the rural exemption be lifted in the future, the Commission would have to consider the cost and feasibility of requiring the TDS Companies to lease portions of their networks to other carriers. That case is not before us and we are persuaded that the TDS Companies will recover any costs incurred in interconnecting with Comcast through fees implemented in a negotiated agreement. The TDS Companies have not provided any evidence to the contrary in this proceeding.

#### **H. Conclusion**

Having considered all of the factors contained in RSA 374:22-g, we find that granting Comcast authorization to operate in the TDS Companies service territories is for the public good.

#### **Based upon the foregoing, it is hereby**

**ORDERED**, the application to operate as a competitive local exchange carrier by Comcast Phone of New Hampshire in the TDS Companies' franchise area is granted.

By order of the Public Utilities Commission of New Hampshire this sixth day of February, 2009.

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Thomas B. Getz  
Chairman

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Graham J. Morrison  
Commissioner

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Clifton C. Below  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary