

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-130

METROCAST CABLEVISION OF NEW HAMPSHIRE

**Application for Certification as a
Competitive Local Exchange Carrier**

Order Denying Motion to Rescind Authority and Motion for Rehearing

ORDER NO. 24,939

February 6, 2009

I. PROCEDURAL HISTORY

On September 19, 2008, MetroCast Cablevision of New Hampshire, LLC (MetroCast) filed an application to amend its certification as a competitive local exchange carrier (CLEC) in New Hampshire to include, in addition to its existing service in the FairPoint¹ service territory, the service territory of Union Telephone Company (Union). Union is a small incumbent local exchange carrier (ILEC) operating in the towns of Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham, and Strafford. On September 30, 2008, pursuant to RSA 374:22-g and N.H. Code of Admin. Rules Puc 431.01, MetroCast was granted authority to operate as a CLEC in the Union service territory.

On October 10, 2008, Union filed a motion to rescind MetroCast's authority to operate in Union's service territory. MetroCast filed an opposition to Union's motion on October 17, 2008. On October 21, 2008, a group of rural members of the New Hampshire Telephone Association (Rural ILECs) filed a letter in support of Union's motions. On October 27, 2008, Comcast

¹ Northern New England Telephone Operations LLC, d/b/a FairPoint Communications – NNE (FairPoint) serves more than 90 percent of the telephone customers in New Hampshire as a result of its acquisition of the Verizon landline business in New Hampshire.

Phone of New Hampshire, LLC, filed a letter disputing Union's interpretation of certain New Hampshire statutes and Commission rules.

II. POSITIONS OF THE PARTIES

A. Union

Union requests that the Commission rescind MetroCast's CLEC authorization in the Union service territory. Union argues that the Commission did not follow an appropriate procedure in granting MetroCast's request to expand its CLEC service territory. According to Union, the Commission is required by RSA 374:26, 374:22-g, 347:22-e, 541-A:31 and 541-A:35, as well as Commission rules, to provide notice to interested parties and an opportunity for hearing. Union claims that following a hearing the Commission must issue an order containing findings as required by RSA 363:17-b. Union asserts it did not receive notice of the Commission's approval of MetroCast's application and that the Commission failed to hold a hearing, make any findings, or issue an order regarding the application.

Union further claims that it was a mistake of law and fact for the Commission to utilize Puc 431.01 and the Puc Part 431 process to authorize MetroCast to operate in the Union service territory. Union maintains that Puc 431.01 only authorizes CLECs to operate in the service territories of non-exempt ILECs. Union asserts that it is an exempt ILEC pursuant to 47 U.S.C. §§ 153 (37) and 251 (f).

Union also argues that the Commission treated Comcast's application to do business in another small ILEC service territory differently than MetroCast's application to do business in Union's service territory. The Commission granted a hearing pursuant to RSA 374:26 in the Comcast case. *See*, Order No. 24,887, *Comcast Phone of New Hampshire, LLC* (August 18, 2008). According to Union, the grant of CLEC authority to MetroCast in Union's service

territory may have an impact on Union's ability to earn a reasonable return and to fulfill universal service and carrier of last resort obligations.

Union asserts that the Commission failed to notify the towns in Union's service territory of MetroCast's CLEC registration contrary to the requirements of RSA 541-A:39, I. Finally, Union requests a rehearing of the Commission's decision to grant MetroCast CLEC authority in the Union service territory.

B. MetroCast

MetroCast argues that Union lacks standing to oppose the MetroCast CLEC application because the amended RSA 374:22-g opens the Union service territory to competition and does not require an adjudicatory proceeding for competitive entry. MetroCast maintains that the repeal of 374:22-f removes Union's ability to claim an exclusive service territory and leaves Union with no right to oppose CLEC entry into its service territory.

MetroCast distinguishes this case from Comcast's CLEC registration in the TDS Companies' services territories on the grounds that the Comcast order, Order No. 24,887 (August 18, 2008), was issued before the amendment of 374:22-g took effect on September 5, 2008. MetroCast also argues that the Comcast case is different because Comcast takes the position that its VoIP (Voice over Internet Protocol) service is not a telecommunications service and is not regulated. MetroCast points out that it had already agreed to submit to regulation of its digital voice service.

MetroCast challenges Union's claims that the CLEC registration process must be conducted as an adjudicatory proceeding by pointing out that the Commission has been issuing CLEC registrations for several years without adjudicative proceedings. MetroCast argues that such an adjudicative process would impose significant burdens of time and cost to CLEC entry

in New Hampshire and would constitute an anti-competitive barrier to entry. Furthermore, according to MetroCast, Union may not use the reference to non-exempt service territories in N.H. Code of Admin. Rules Puc 431.01(d) as a bar to MetroCast's entry because the amendment to 374:22-g preempts that rule.

Finally, MetroCast takes the position that RSA 541-A:39 does not require the Commission to notify the municipalities of the MetroCast CLEC registration. Since MetroCast will be offering its telephone service over pre-existing facilities, MetroCast takes the position that the grant of certification has no direct effect on municipalities.

C. Rural ILECs

Granite State Telephone, Inc., Merrimack County Telephone Company, Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc., Dunbarton Telephone Company, Inc. Bretton Woods Telephone Company, Inc., Northland Telephone Company of Maine, Inc. and Dixville Telephone Company, all rural carriers and members of New Hampshire Telephone Association (Rural ILECs), support Union's motions. The Rural ILECs argue that RSA 374:22-g must be read in conjunction with RSA 374:22 and RSA 374:26. The Rural ILECs maintain that RSA 374:26 requires a hearing if interested parties are not in agreement, and therefore they assert that the Commission must conduct a hearing in this case.

The Rural ILECs claim that the Commission may not rely upon the procedure set out in Puc 431.01 and 431.02 because the language "non-exempt ILECs" prevents the Commission from allowing entry into small carriers' service territories. The Rural ILECs take the position that the Commission must undertake a new rulemaking process to determine the procedure for allowing CLECs to enter small carrier's service territories.

D. Comcast

Comcast argues that Union's interpretation of 374:22-g would erect barriers to entry for all competitive telecommunications carriers in the form of lengthy hearings involving difficult-to-prove evidentiary findings in the control of ILECs. Further according to Comcast, Union's position attempts to alter the entry procedures the Commission has applied routinely under Puc 431.01-431.02 and undermines the policy of the State of New Hampshire to encourage competition for telecommunications services.² Comcast points out that the amendment of RSA 374:22-g and the repeal of RSA 374:22-f makes it clear that there is to be competition for telephone service in all areas of the state. Comcast disagrees with the Rural ILECs' assertion that the Commission should open a new rulemaking process to deal with CLEC entry into small ILEC service territories. Instead, Comcast asserts that 374:22-g requires that the same process apply to both large and small ILECs.

Comcast argues that statutory rules of construction provide that the more recent, more specific statute, RSA 374:22-g, controls over prior general ones such as RSA 374:26. Further, Comcast states that if the legislature had intended to require a hearing for CLEC entry into small ILEC territories it could have provided a reference to RSA 374:26, or for a hearing, in RSA 374:22-g. Finally, Comcast maintains that reliance on the non-exempt language in Puc 431.01(d) is misplaced in light of the amendments to RSA 374:22-g.

III. COMMISSION ANALYSIS

This case calls into question the Commission's authority to act pursuant to RSA 374:22-g and Commission rules, Puc 431.01-431.02, to allow an existing cable provider to begin providing competitive telephone services within a small ILEC's service territory.

² 1995 N.H. Laws 147:1.

A. State and Federal Statutory Analysis

We begin by observing that the telecommunications landscape for small ILECs in New Hampshire is governed by the same federal statute that governs the largest ILEC. Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the essential distinction between small and large ILECs is that small ILECs³ are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union and the Rural ILECs are not currently required to unbundle their networks to CLECs in New Hampshire.

At the state level, due to recent legislative changes, large and small ILECs are treated the same for purposes of competitive entry into their service territories. Both are now governed by RSA 374:22-g, which provides that all telephone service territories will be nonexclusive. RSA 374:22-g further allows the Commission to authorize multiple telecommunications carriers in any telephone service territory “*to the extent consistent with federal law and notwithstanding any other provision of law to the contrary.*” RSA 374:22-g, I (emphasis added).

We read RSA 374:22-g to grant us the discretion to permit competitive local exchange carriers to do business within the service territory of Union Telephone. We further conclude that RSA 374:22-g does not require a hearing in order to grant a CLEC application and, correspondingly, the necessary requirements of due process are satisfied by the procedures set forth in our rules. *See*, Puc Part 431. RSA 374:22-g instructs us to implement the section consistent with federal law and notwithstanding inconsistent state laws. RSA 374:22-g, enacted

³ 47 U.S.C. § 153 (37) defines rural telephone as below 50,000 access lines or operating in areas with less concentrated populations.

in 1995 and amended in 2008, deals specifically with telecommunications services. RSA 374:26, enacted in 1911 and amended in 1961, deals more generally with all types of utilities franchises. As a result, RSA 374:22-g is the more recent and more specific statute and should control in cases regarding telephone franchises. *See, Bel Air Associates v. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006).

State and national policies encourage competition in local telecommunications service. Policy makers have chosen to encourage that policy because they believe it leads to economic efficiency. The only thing that distinguishes this CLEC application from the numerous others we have approved through our streamlined registration process under Puc Part 431 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 (a) and (b) make clear that all local exchange carriers, regardless of size, 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. RSA 374:22-g treats all New Hampshire ILECs, whether large or small, equally concerning competitive entry. Finally, the 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition. 47 U.S.C. § 253. In an effort to support the important policy goal of promoting competitive telecommunications markets and to comply with federal statutes, the Commission's CLEC registration rules provide for an administratively efficient process for competitors to enter the local telecommunications market. *See*, Puc 431.01.

Union has claimed that it is entitled to the same process provided in the Comcast CLEC application to provide service in several TDS Company service territories.⁴ Comcast made its CLEC application before RSA 374:22-g was amended. As a result, the Commission could not consider the application under RSA 374:22-g because the TDS Companies each had less than 25,000 access lines. The Commission considered the Comcast CLEC application pursuant to RSA 374:22 and RSA 374:26, the more general utility franchise provisions. Because RSA 374:26 provided for hearing and the TDS Companies opposed Comcast's entry into their service territories, the Commission set the matter for hearing. As discussed above, the MetroCast application was made within a different statutory context and a different process therefore applies.

Finally, we reject Union's claims that RSA 541-A:39 requires us to give notice to the municipalities in which MetroCast seeks CLEC authorization. RSA 541-A:39 is triggered by actions which directly affect the municipality. In this case MetroCast already provides cable service and operates cable plant in the municipalities where it proposes to provide telephone services. We do not find the provision of telephone service over existing cable plant to cause any direct effect on these municipalities.

B. Commission Rules and Rulemaking Authority

RSA 374:22-g, III provides the Commission with specific authority to promulgate rules to enforce the section and the Commission must act within the authority delegated to it by the legislature. *See, Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 689 (2008). When the Commission exercised the authority delegated to it by RSA 374:22-g and updated the rules in 2005, it balanced competing interests, including competition, fairness, economic efficiency,

⁴ *See*, DT 08-013 *Comcast Phone of New Hampshire, Request for Authority to Provide Local Telecommunication Services*, Order No. 24,887 (Aug. 18, 2008). Order granting hearing.

universal service, carrier of last resort obligations, and an ILEC's ability to earn a reasonable return and recover costs incurred to serve CLECs. Puc Part 431 strikes an appropriate balance among these various interests regardless of whether the ILEC service territory is large or small.

Consistent with RSA 374:22-g, the current rules support competition, fairness and economic efficiency by allowing for an administratively efficient process to register a CLEC and by eliminating unnecessary barriers to CLEC entry into ILEC service territories. In cases where the ILEC's costs exceed those of an efficient competitor, the development of a competitive market may cause the ILEC to either lose customers, or find ways to reduce costs,⁵ but such a result is fully consistent with RSA 374:22-g. The carrier of last resort burden may be more expensive for small ILECs than for larger ILECs but under the current federal statutory scheme, ILECs operating in high cost service areas are compensated for this obligation through the universal service fund (USF). *See*, 47 U.S.C. § 254. In fact, the ILEC at issue in this case, Union, received a total of approximately \$1.135 million in federal high cost support in 2007⁶. In addition, ILECs can negotiate the price and terms of traffic exchange, as required by 47 U.S.C. § 251 (b)(5), to recover the costs incurred to serve a CLEC. This provides an adequate vehicle for Union to recover expenses incurred to benefit competitive providers.

The fact that small ILECs had exclusive service territories under state law at the time the CLEC rules were last updated in 2005 does not mean those rules should not apply equally to large and small ILECs now that RSA 374:22-g has been amended. RSA 374:22-g makes no distinction between small and large ILECs. We find no sound policy reason to promulgate separate rules for small ILECs, nor has Union given any in its request to rescind our registration

⁵ In recognition of the pressures on small ILECs created by competitive markets the legislature has provided for small ILECs to request pricing flexibility and less regulation. *See*, RSA 374:3-b.

⁶ FCC, Universal Service Monitoring Report, CC Docket No. 98-202, 2007, Table 3-30, at 3-134.

of MetroCast. The Puc Part 431 rules do not contain any express prohibition on registering CLECs in non-exempt ILEC service territories. The reference to non-exempt ILECs in Puc 431.01(d) does not prohibit registration of CLECs in non-exempt ILEC service territories. To interpret Puc 431.01(d) as such a prohibition would be inconsistent with federal law and contrary to our statutory directive in RSA 374:22-g, which operates “notwithstanding any other provision of law to the contrary” and thus prevails over any conflicting rule.

C. Conclusion

Consistent with the enabling legislation, RSA 374:22-g, as well as federal law, we have developed an administratively efficient process for CLEC registration to compete in ILEC service territories. MetroCast already operates in many areas of the state and has proven itself to be a competent and responsible CLEC. We find Union’s arguments concerning the process of registering MetroCast in its service territory unpersuasive and we conclude that MetroCast’s expansion of service into the Union service territory will be for the public good.

Based upon the foregoing, it is hereby

ORDERED, that Union’s Motion to Rescind MetroCast’s competitive local exchange carrier registration is **DENIED**; and it is

FURTHER ORDERED, that Union’s Motion for Rehearing is **DENIED**.

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary