STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 10-183

RURAL TELEPHONE COMPANIES

CLEC Registrations Within RLEC Exchanges

Order on the Merits

O R D E R N O. 25,277

October 21, 2011

I. FACTUAL AND PROCEDURAL HISTORY

On September 19, 2008, MetroCast Cablevision of New Hampshire, LLC (MetroCast) applied to the Commission to amend its existing certification as a competitive local exchange carrier (CLEC) to include the service territory of Union Telephone Company, Inc. (Union), a rural incumbent local exchange carrier (RLEC). *See* Docket No. DT 08-130. On September 30, 2008, the Commission, without conducting an adjudicated proceeding, granted MetroCast's request to operate as a CLEC in Union's service territory. On October 14, 2008, Union filed an objection with the Commission opposing MetroCast's certification as a CLEC in its territory, and arguing that the Commission had not complied with various provisions of state law requiring notice and hearing prior to allowing CLECs to enter the service territory of RLECs such as Union. Accordingly, Union requested that the Commission rescind the authority granted to MetroCast or grant rehearing on MetroCast's application. By Order No. 24,939 (February 6, 2009), the Commission denied the motion to rescind authority and the request for rehearing. That denial was appealed to the New Hampshire Supreme Court.

On February 23, 2009, IDT America, Corp. (IDT) applied to the Commission to amend its existing CLEC certification to include Union's service territory. *See* Docket No. DT 09-065. Effective March 6, 2009, the Commission granted IDT's request to enter Union's territory without conducting an adjudicated proceeding. On April 3, 2009, Union filed a request to rescind the authority granted to IDT or to grant rehearing. By Order No. 24,970 (May 22, 2009) the Commission denied the motion to rescind authority and the request for rehearing. That denial was appealed to the New Hampshire Supreme Court, and the appeal was consolidated with the MetroCast appeal.

On October 15, 2009, four RLECs, Granite State Telephone, Inc., Dunbarton Telephone Company, Inc., Bretton Woods Telephone Company, Inc. and Dixville Telephone Company (collectively the RLECs or Petitioners), filed a petition against segTEL, Inc. (segTEL), a CLEC, arguing that the statewide CLEC registration granted to segTEL should be null and void. *See* Docket No. DT 09-198. According to the RLECs, segTEL had been granted authority to operate in all New Hampshire exchanges, including those in their territories, in violation of New Hampshire's notice and hearing requirements. The RLECs' arguments were substantially the same as those made by Union in opposition to the CLEC registrations of MetroCast and IDT.

On May 20, 2010, the New Hampshire Supreme Court released its opinion in *Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 309 (2010) (*Union Telephone*). The Court concluded that the registration process contained in the Commission's rules, N.H. Code of Admin. R. Puc 431, did not apply to RLECs because it specifically covers the territories of "non-exempt" incumbent local exchange carriers (ILECs) and the RLECs are exempt. *Id*. at 316-17. The Court further concluded that New Hampshire law required the

Commission to adhere to certain notice and hearing requirements relative to the entry of CLECs into the territories of RLECs, and that it had not done so when granting authority to MetroCast and IDT. *Id*. at 318-19. The Court, therefore, reversed the Commission's decision granting authority to MetroCast and IDT to operate as CLECs in Union's service territory. *Id*. at 319. The Court also determined that federal law may preempt state law requirements for notice and hearing. *Id*. at 319-21. It therefore remanded the matters to the Commission to determine whether state law is preempted by federal law, specifically portions of 47 U.S.C. §251 *et seq*., of the Telecommunications Act of 1996 (the Act). *Id*. at 319-21.

Upon remand, the Commission set a pre-hearing conference in Docket Nos. DT 08-130 and DT 09-065 for July 1, 2010, for the purpose of developing a factual record sufficient to determine whether federal law preempts state law requirements. The Commission also issued an Order of Notice in Docket No. DT 09-198 setting a pre-hearing conference for the same date because it raised similar preemption issues.

Following a consolidated pre-hearing conference, the parties to the various dockets met with Staff in a technical session after which Staff submitted a report indicating that a settlement was likely in Docket Nos. DT 08-130 and DT 09-065. Staff's report requested that no further action be taken on those dockets pending the filing of a settlement. In Docket No. DT 09-198, segTEL argued that it was not the only entity to have been granted authority to operate in all exchanges and therefore it had been unfairly singled out. Staff's report indicated that the RLECs would agree to dismiss, without prejudice, their petition against segTEL and that they would file a new, more general petition on the registrations of CLECs in RLECs' territories.

On July 13, 2010, the RLECs filed a new petition challenging, generally, the process used by the Commission in granting authorizations to CLECs to operate in the territories of RLECs and arguing that the process required by New Hampshire law is not preempted by federal law. In addition, the RLECs requested that any registrations granted to CLECs to operate in RLECs' territories without the proper process under RSA 374:26 and 374:22-g be declared null and void. On August 5, 2010, the Commission issued an order of notice in this docket and dismissed Docket No. DT 09-198.

On December 13, 2010, Union, MetroCast and IDT filed a settlement agreement among them in which Union agreed to withdraw its opposition to the entry of MetroCast and IDT into its territory in exchange for the support of those entities in Union's bid for alternative regulation. *See* Docket No. DT 11-024. By Order No. 25,193 (January 18, 2011), the Commission approved the settlement agreement, thereby granting MetroCast and IDT entry into Union's service territory and closing Docket Nos. DT 08-130 and DT 09-065.

As a result of the above actions, the only remaining docket is DT 10-183, the RLECs' generic petition contending that the registration process under New Hampshire law, as determined in *Union Telephone*, is the required process and that this process is not preempted by federal law. On October 5, 2010, the New England Cable and Telecommunications Association, Inc. (NECTA), segTEL, the RLECs and Staff entered into a joint stipulation (Stipulation) that set out their understanding of the certification process required under New Hampshire law if it is not preempted by federal law. On October 22, 2010, the RLECs submitted the pre-filed testimony of Douglas Meredith and on October 25, 2010, NECTA submitted the pre-filed testimony of Dr. Michael Pelcovits and segTEL submitted the pre-filed testimony of Kath Mulholland. Following

the production of discovery, on December 8, 2010, the RLECs submitted Mr. Meredith's rebuttal testimony and NECTA submitted Dr. Pelcovits' rebuttal testimony.

The parties submitted a letter seeking cancellation of the January 21, 2011 hearing and asking that the official record on which to base a decision consist of the pre-filed direct and reply testimony and the data requests and responses that had been exchanged between the parties. By Secretarial Letter dated January 20, 2011, the Commission determined that it would postpone the hearing and take the request regarding establishment of the record under advisement. Briefs were submitted on February 11, 2011, by the RLECs, NECTA and segTEL and reply briefs by each were submitted on February 25.

II. POSITIONS OF THE PARTIES AND STAFF

A. Joint Stipulation

As noted, the RLECs, NECTA, segTEL and Staff entered into the Stipulation which sets out their collective understanding of the process that would be required under New Hampshire law, unless that process is preempted by federal law. Assuming, *arguendo*, that there is no preemption, the process stipulated by the parties would be as follows:

> a. Except as provided in Puc Rules Part 431, regarding registration in the service territory of a non-exempt ILEC, the CLEC will request entry into a telephone utility service territory via petition, application or other form of request.
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> b. Public notice, commonly in the form of a Commission Order of Notice, will be published relative to the CLEC request and the nature of applicable Commission review. This Notice will be served on the affected RLECs serving the service territories for which entry is requested.
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> c. The affected RLEC will be a mandatory party and other interested parties can petition to intervene in the proceeding.

d. An initial Commission pre-hearing conference and technical session will be held to decide interventions and determine a schedule for procedural steps.

e. The RLEC and other parties will be afforded an opportunity to file testimony (initial and, in certain cases, rebuttal) on any relevant factor listed in RSA 374:22-g and other facts material to the CLEC request.

f. The parties will have the opportunity to propound discovery on testimony and other evidence offered prior to a public evidentiary hearing.

g. The parties will have the opportunity for a public evidentiary hearing to review and address evidence submitted for possible inclusion in the record.

h. The parties can file briefs and/or requests for findings of fact or law.

i. The Commission will issue an Order pursuant to RSA 363:17-b.

j. Parties can petition for reconsideration or appeal of an adverse Commission ruling pursuant to RSA 541:1, RSA 541:6 or other applicable appeal statutes.

Stipulation at 3-4.

B. Initial Briefs of the Parties

1. RLECs

The RLECs begin by stating that much testimony was offered on entry barriers, the merits of competition and universal service, but that the only issue before the Commission is the comparison of the state and federal laws. According to the RLECs, "Any other concerns specific to any particular RLEC territory or CLEC petition are distinct and separate matters meriting their own inquiry under rules the Commission must propagate pursuant to RSA 374:22-g, III." RLECs' Initial Brief at 2-3. The RLECs therefore contend that this proceeding is only about whether a state imposed entry requirement "rises to such a level that it is effectively an outright prohibition." RLECs' Initial Brief at 3.

The RLECs contend that the requirements of RSA 374:22-g do not amount to a prohibition under §253(a) of the Act. According to the RLECs, § 253(a) of the Act is concerned with avoiding "*state actions* that prohibit competitive entry" by CLECs into RLECs' territories. RLECs' Initial Brief at 4 (emphasis in original). They contend that any barriers to entry created by the state registration requirement must be more than inconvenient, but must amount to a material limitation or prohibition on the ability of competitors to compete. The RLECs argue that New Hampshire's limitations do not create such material limitations or prohibitions. Further, the RLECs point out that §§ 253(b) and (f) of the Act contemplate that other protections may be considered or imposed by the state, such as considerations of universal service and carrier of last resort obligations. Accordingly, the RLECs argue, state and federal law are consistent, not conflicting.

Next, the RLECs contend that the procedures as outlined in the Stipulation are reasonable and lawful in light of other states' procedures. According to the RLECs, New Hampshire's requirements are "not out of the ordinary" for CLEC entry requirements. RLECs' Initial Brief at 7. Further, they contend that there are no cases where a market entry proceeding such as the one contemplated by RSA 374:22-g has been preempted by the Federal Communications Commission (FCC) and that on the occasions the FCC has preempted a state requirement it is because the state requirements "were either an express ban on CLEC entry, or vested veto power in the hands of the ILEC." RLECs' Initial Brief at 8. The RLECs assert that unlike those situations, New Hampshire's law requires that the applicant demonstrate how competitive entry serves the public good in the particular situation and involving the particular parties in that territory. Furthermore, the RLECs claim that because the CLEC business model is generally one

of "cherry-picking" the low-cost, high-volume customers, in determining the public good it is relevant to consider the issues relating to the costs to serve various subscribers and the "effect of mandatory rate averaging, which directly affects the ILEC's rate of return and its ability to sustain its obligations as the carrier of last resort." RLECs' Initial Brief at 9-10.

The RLECs next argue that the costs of the application and potential hearing process are not prohibitive when compared with the other costs of obtaining market entry. The RLECs note that NECTA's witness, Dr. Pelcovits, contends that when considering all costs of entry, such as the purchasing and installing of facilities and equipment, the costs of an additional regulatory proceeding could discourage potential entrants. The RLECs, however, point to prior testimony of Dr. Pelcovits as being inconsistent with this current position. According to the RLECs, Dr. Pelcovits previously contended that the main factor discouraging competition was the cost of network construction, not regulatory costs, and now he is arguing that the cost of a proceeding before the Commission would be sufficient to discourage competitive entry.

In addition to the above criticisms of Dr. Pelcovits' testimony, the RLECs also dispute the calculations in his testimony about the monetary value to be obtained by competitive entry. According to the RLECs, the base of information from which Dr. Pelcovits derived the costs and benefits of entry is questionable and results in numbers that indicate an unreasonably low expectation of revenues. Further, the RLECs argue that Dr. Pelcovits' market penetration assumptions are overly conservative. As such, the RLECs argue that the potential revenue stream from competitive entry is higher than projected by Dr. Pelcovits and, therefore, the impact of any regulatory costs is less significant than assumed by Dr. Pelcovits. In addition, the RLECs point out that because there are other reasonable means to calculate a proposed revenue

stream, the numbers put forth by Dr. Pelcovits are little more than guesses and are insufficient to show that the costs of entry created by a hearing process are prohibitively high.

2. segTEL

segTEL argues first that it is neither the registration nor authorization of any particular CLEC that is at issue but, rather, whether the Commission may consider all or some of the factors set out in RSA 374:22-g in ruling upon the registration of a CLEC. According to segTEL, the process set out in the Stipulation relative to RSA 374:22-g violates § 253(a) of the Act and is not saved by the provisions of § 253(b).

After noting the limits of the Commission's authority over the regulation of local telecommunications competition, segTEL contends that under precedent as established in the First Circuit, the state and the Commission are prohibited from "creating, enacting or enforcing any regulation or local legal requirement" which prohibits or has the possibility of prohibiting any interstate or intrastate telecommunications service, or which would inhibit segTEL from competing in a fair and balanced legal and regulatory environment. Initial Brief of segTEL at 6. segTEL argues that RSA 374:22-g sets out two key considerations: first, that all telephone franchise areas shall be nonexclusive, and second that the Commission may authorize the provision of competitive services if it is determined to be for the public good. segTEL contends that it is the public good determination that violates federal law because it is "both impermissibly vague and irrelevant to the ability of a competitor to provide utility service." Initial Brief of segTEL at 6.

segTEL stresses that its entry as a CLEC has been found to be for the public good in "every other part of the state" and therefore the only issue for the Commission to review is

whether it, or any other CLEC, is qualified to serve in the RLECs' territories. Initial Brief of segTEL at 7. RSA 374:22-g, however, requires the Commission to consider whether entry is for the public good based on "qualities inherent to the RLEC and the market" which grants an impermissible level of protection to the RLEC. Initial Brief of segTEL at 7.

segTEL contends that this case is "identical" to *In the Matter of Silver Star Telephone Company*, 12 F.C.C.R. 15639 (1997) (*Silver Star*). There, the FCC preempted a provision of Wyoming's law that gave RLECs in that state the ability to completely block the entry of competitors for nine to twelve years following the enactment of the Act. According to segTEL, the process outlined in the Stipulation raises a barrier to entry like that in *Silver Star*. Additionally, segTEL contends that New Hampshire is unique in requiring a CLEC to file information on an entity other than itself in order to gain entry. These burdens, segTEL argues, are preempted by federal law.

segTEL notes that if a state requirement is preempted by the operation of § 253(a) it may yet be saved by the operation of § 253(b). segTEL, however, contends that RSA 374:22-g exceeds the permissible considerations of § 253(b) and is therefore not protected by that provision. According to segTEL, the factors set out in RSA 374:22-g are either too vague to be protected, or are simply not covered by the provisions of § 253(b). Lastly, specific to carrier of last resort obligations, segTEL contends that though this issue is "of interest" to the state and though there may be a policy reason for reviewing these obligations, carrier of last resort obligations may not be considered when determining whether an entity is allowed to provide competitive service.

3. NECTA

NECTA, a non-profit corporation and trade association representing the interests of most cable television companies and their voice and Internet affiliates in New England, argues that the "multi-stage, multi-factor adjudicative hearing requirement applicable to each and every CLEC certification request in RLEC service areas, unless voluntarily waived by all parties (including the affected RLEC), establishes a significantly burdensome and costly entry process." Initial NECTA Brief at 2. NECTA claims that the requirements of RSA 374:22-g significantly increase the potential burdens on CLECs to produce evidence about the RLEC and to respond to the RLEC's claims, including through written pleadings and the retention of attorneys and experts on RLEC finances. NECTA contends that this could expand a request for entry into a rate case-like proceeding and create significant burdens on entry. This, according to NECTA, is especially the case since RLECs realize the injury to their business that could result from a competitor's entry and will expend significant resources to defend their existing monopolies. Also, according to NECTA the New Hampshire process is substantially more burdensome than that in the surrounding states. According to NECTA, the time for, and complexity of, the registration process would result in sufficiently high costs and CLEC entry would be discouraged.

NECTA argues, based on Dr. Pelcovits' analysis, that the profit potential in these rural areas is relatively small and therefore a rise in entry costs discourages entry. Further, NECTA notes that even apart from the registration costs, the cost of gaining entry to a rural market is relatively high. This combination of relatively high costs combined with relatively low profits means that any increase in costs through a hearing process could discourage entry and must therefore be preempted.

In addition, NECTA notes that the RLECs have argued that one solution to the universal service issue would be to require the competitor to become registered as an eligible telecommunications carrier (ETC). According to NECTA, being required to become an ETC and subject to the burdens of that designation would "render more unwieldy that which already is excessively burdensome." Initial NECTA Brief at 16.

In addition, NECTA contends that the sunk costs of entry, *i.e.*, the costs that could not be recovered by the CLEC if entry is denied, add to the risk. Among the sunk costs that could potentially be incurred would be the costs of litigating issues relating to the incumbent's rate of return and opportunity to earn a reasonable profit, as well as other issues. NECTA contends that these are general matters which are better left to rulemaking proceedings and which should not be addressed in any individual application for entry.

NECTA recommends that rather than use the process required by RSA 374:22-g as set out in the Stipulation, the Commission should use the non-adjudicative process that it has used to certify CLECs in non-RLEC territories. As noted, NECTA believes that the question of whether to allow a CLEC to enter RLEC territory should be separate from other questions about regulatory policy, requests for alternative regulation by RLECs, or other investigations into the provision of service in RLEC territories. NECTA contends that issues of regulatory policy relative to the development of competition in rural areas should not be dealt with on the basis of individual applications to serve, but on a broader basis, and in a way that does not limit the availability of new services to rural customers. Further, NECTA argues that preemption of the existing scheme and replacement with a more streamlined process is in line with the pro-competition goals of state and federal policy.

C. Reply Briefs of the Parties

1. RLECs

In their reply brief, the RLECs argue that the Commission should reject the "diluted standard" proposed by the CLECs for determining whether state law should be preempted. RLECs' Reply Brief at 1. As stated by the RLECs, the standard proposed by segTEL "seems to say that any Commission regulation would be preempted, since it creates the 'mere possibility' that a carrier could be prohibited from offering service." RLECs' Reply Brief at 2. As formulated by the RLECs the test is one of whether the state law poses a material impediment to the ability to compete, which is a higher standard than that proposed by either NECTA or segTEL.

The RLECs further contend that the authorities relied upon by the other parties are not relevant to the instant matter or are not supportive of their positions. With specific reference to *Silver Star*, the RLECs argue that the case is inapposite because, unlike that case, "there is no power vested in the ILEC," to veto the entry of a competitor and the Commission is charged with making a public interest determination on factors that may not require unconditionally granting the application. RLECs' Reply Brief at 4. Additionally, the RLECs posit that the situation under review by the Wisconsin Public Service Commission in *Re Sprint Communications Company, L.P.*, No. 6055-NC-103, 2008 WL 2787762 (Wisconsin Public Service Commission May 9, 2008) is distinct from the one here because there the relevant law mandated that the state commission find that a competitive service was "required" before allowing entry. The RLECs contend that the bar erected by that statute was higher than the one created by New Hampshire law and thus the Wisconsin law could be preempted, while New Hampshire law should not.

In reviewing the relevant procedures, the RLECs also contend that the other parties have exaggerated the burden imposed by the process required under state law. First, the RLECs point out that the benefits of entry are greater than thought by NECTA and, relatively speaking, the burden is lesser. Second, the RLECs contend that "it makes no sense to assume that the RSA 374:22-g inquiry will be tantamount to a rate case." RLECs' Reply Brief at 6. According to the RLECs, the review of costs would be a "higher level analysis of fixed and common costs as they relate to average revenue per customer." RLECs' Reply Brief at 7. Ultimately, the RLECs contend, "the RSA 374:22-g inquiry is not concerned with rates, but only the *overall rate-of-return* of the incumbent, i.e. a *top-down* review of whether revenues cover costs, particularly sunk costs." RLECs' Reply Brief at 7 (emphasis in original).

The RLECs dismiss segTEL's contention that New Hampshire law is unique in requiring that the petitioning CLEC prove that competition is for the public good and that the entity against which it will compete is capable of withstanding competition. Instead, the RLECs' point out that RSA 374:22-g manifests a public policy that competition is for the public good "under certain conditions." RLECs' Reply Brief at 8. The RLECs also acknowledge that the applying CLEC cannot be expected to have the burden of production, nor to demonstrate that the RLEC is sufficiently healthy to withstand competition.

Lastly, the RLECs argue that the procedures required by RSA 374:22-g are consistent with public policy. They state that the issue here is not whether competition is, for the public good, but whether the state law implementing that policy is consistent with federal law. To that end, the RLECs contend that the state law requires review of many items including, in particular, the RLECs' carrier of last resort obligations in the course of determining whether to allow a

competitor to compete. Further, the RLECs contend that although NECTA has suggested using a state universal service fund to aid incumbent carriers, the creation of such a fund is unlikely "in the current political and economic climate." RLECs' Reply Brief at 9. In that § 253(b) permits states to impose certain regulations pertaining to universal service, public safety and welfare and the continued quality of service to customers, there is, according to the RLECs, an obligation to review carrier of last resort obligations and the extent to which they create an uneven playing field with unregulated entities.

2. segTEL

segTEL first contends that the state scheme requires the Commission to consider not the qualifications of the potential competitor, but the "situation", and that considering the situation may result in denying entry to an entrant who is, in all other ways, qualified to provide service. segTEL Reply Brief at 3. This, segTEL argues, is contrary to the terms of § 253 of the Act because considering the situation could lead to an examination lasting months, and which may result in the ultimate rejection of an applicant who is qualified to provide and capable of providing service. segTEL also contends that under precedent in the First Circuit, the standard for determining whether state law is preempted is different, and less stringent, than the one advocated by the RLECs.

In addition, according to segTEL, absent a *bona fide* request under § 251(f) of the Act there is no basis to conduct any economic analysis of the incumbent. segTEL points out that § 251 covers certain requirements for interconnection and network access between CLECs and incumbents, and that § 251(f) exempts rural incumbent carriers from some of those requirements until a CLEC makes a *bona fide* request for them. In ruling upon such a request, segTEL notes,

the Commission must determine whether granting the request is, among other things, not unduly economically burdensome. In segTEL's formulation, because no *bona fide* request has been made of the RLECs, there is no basis upon which to conduct an inquiry into their economic burdens. segTEL contends that since this exemption is the only protection for RLECs authorized by Congress, the state is not permitted to impose additional protections because those protections would have the effect of prohibiting entry.

segTEL next posits that the state's system requires a finding of public good which, since it is more onerous than a simple registration requirement, is an entry barrier sufficient to run afoul of § 253. According to segTEL, the plain language of § 253 presumes that any entity engaged in providing telecommunications services is entitled to deliver those services and because RSA 374:22-g gives the state the power to reject an application on the basis that it is not "fair" or "economically efficient," state law subverts the federal presumption.

Specific to its situation, segTEL contends that its ability to act as a CLEC in all New Hampshire exchanges has already been found to be for the public good by the Commission's grant of authority to it. *See segTEL, Inc.*, Order No. 23,898 (Jan. 11, 2002) (amended by Secretarial Letter March 3, 2009). Thus, if the Commission were to now find that segTEL is not permitted to compete in an RLEC's territory, segTEL contends such a finding would unduly favor the incumbent, and abrogate the Commission's prior finding relative to it. Further, because it has long been providing service in other territories, segTEL contends that any rejection of its ability to compete in a particular territory would necessarily be based on something other than its ability to reliably provide services. Instead, it would be based upon the territory served and the

company serving that territory. This, in segTEL's analysis, would create a protective barrier around the RLECs in contravention of § 253.

segTEL further argues that since the purpose of the federal statutes is to promote openness and competition and to reduce regulation, the state system is in conflict with the federal. No matter how streamlined that process may be, argues segTEL, there will be delay that conflicts with the federal requirements. According to segTEL "*any* state process that has the potential for creating substantial delays for a CLEC to compete in the market is preempted and the imposition of a hearing requirement further imposes a material barrier to entry that lasts as long as the RLEC's right and inclination to request a hearing persists." segTEL Reply Brief at 14 (emphasis in original).

segTEL next contends that the process required by RSA 372:22-g and 374:26 effectively prohibits the provision of interstate services and must therefore be preempted. segTEL avers that it provides both intrastate and interstate telecommunications services and that any process which would limit its ability to offer intrastate services would also hamper its ability to provide interstate services. Since interstate services are beyond the jurisdiction of this Commission, segTEL contends that delays in the state certification would impact matters over which the Commission has no authority.

In addition to its arguments that the state law is preempted by § 253(a), segTEL again contends that the state statutes are not saved by the provisions of § 253(b). First, segTEL contends that the state requirements do not fall within § 253(b) because they are not competitively neutral. Particularly, segTEL points to the RLECs' argument that new entrants would "cherry pick" the low cost, high volume customers and irreparably damage the incumbent.

As segTEL argues "the RLECs' position implies that a competitive entrant whose business model is identical to the incumbent model might allow a grant of authority, while those entrants with a different business model that can be shown to have a direct affect [*sic*] on the incumbent's rate of return might be denied." segTEL Reply Brief at 16. This is, as contended by segTEL, not a competitively neutral outcome.

Furthermore, segTEL contends that there is no competitive neutrality because the process as outlined in the Stipulation could result in entry to some territories, but not others, because concepts such as fairness are too vague and subjective to be applied consistently. Lastly, segTEL contends that the state statutes are not competitively neutral because they treat CLECs differently from cellular carriers. Since competitive neutrality is required as between all entrants and potential entrants into a market, segTEL argues that the state laws are not acting in a competitively neutral manner.

In addition to contending that the state laws are not competitively neutral, segTEL contends that those portions of the statute addressing matters over which the state could possibly have authority are inextricably linked with those it cannot. Therefore, according to segTEL, the list of items to be considered by the Commission is not severable, either as a complete list, or as individual items, and consideration of all items must be preempted. Thus, the Commission may not, in this context, review items such as universal service without acting in a manner contrary to federal law. According to segTEL, only the registration rules adopted by the Commission applicable to non-RLEC territories provide the appropriate balance and, with some revision, may still be employed in the registration of CLECs in all territories.

3. NECTA

NECTA first contends that the standard for review advocated by the RLECs is misstated as requiring that preemption requires an outright prohibition on entry. According to NECTA, the RLECs' interpretation is excessively narrow and should be rejected.

Further, NECTA contends that the RLECs are too generous in their interpretation of the savings clause in § 253(b). NECTA points out that the RLECs argue that many of the criteria in RSA 374:22-g are covered by § 253(b), but they ignore "the most burdensome requirement," which is the incumbent's opportunity to earn a reasonable return. NECTA Reply Brief at 5. Further, NECTA contends that the federal law does not permit the interests of "fairness" to be considered in this context.

NECTA also argues that the RLECs' analysis is flawed because even if it permitted the states to review certain items, the states do not have the discretion to condition their review of the reserved items "through a burdensome, costly and anti-competitive mechanism of case by case CLEC entry request adjudication." NECTA Reply Brief at 6. NECTA also argues that the requirements of the state process are not "necessary" as required by § 253(b) and absent a showing of necessity, the state process cannot stand. Also according to NECTA, the New Hampshire process is neither reasonable nor comparable to the other states cited by the RLECs.

Regarding the argument that application costs are not prohibitive when compared to the other costs of obtaining entry, NECTA contends that the RLECs' arguments should be viewed skeptically since the record in this case reflects limited profit potential for competitors. NECTA disputes the RLECs' claim that Dr. Pelcovits' testimony about possible profits for competitors in RLEC territories is flawed. NECTA reasserts that it is the costs of a hearing in combination with

the other costs of entry that renders the New Hampshire process a prohibitive barrier in light of the limited profits to be obtained. NECTA also disputes the specific bases on which the RLECs challenged Dr. Pelcovits' testimony as having misunderstood the evidence or arguments. In sum, NECTA contends that the "adjudicative hearing process in RSA 374:22-g, RSA 374:26 and other statutes, as interpreted in the Union Appeal, is federally preempted." NECTA Reply Brief at 15.

III. COMMISSION ANALYSIS

Before analyzing the issues presented, we designate the record in this case as: (1) the Joint Stipulation of Agreed Facts filed on October 5, 2010; (2) the parties' initial and reply briefs; (3) the parties' initial and reply testimony; and (4) all data requests and responses exchanged by the parties. We begin our analysis with an examination of the State and Federal statutes governing CLEC entry into RLEC service territories in New Hampshire.

A. New Hampshire Statutes

The New Hampshire Supreme Court interprets RSA 374:26 to require the Commission to allow a CLEC to operate in an RLEC service territory only after finding that engaging in such business will be for the public good. *Union Telephone*, 160 N.H. at 319. Such a finding is to be made after "due hearing," which need not be held if all interested parties are in agreement. RSA 374:22-g governs CLEC entry into RLEC service territories and states:

> I. To the extent consistent with federal law and notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service, subject to the jurisdiction of the commission, shall be nonexclusive. The commission, upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory,

> when the commission finds and determines that it is consistent with the public good unless prohibited by federal law.
>
> II. In determining the public good, the commission shall consider the interests of competition with other factors including, but not limited to, fairness; economic efficiency; universal service; carrier of last resort obligations; the incumbent utility's opportunity to realize a reasonable return on its investment; and 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.
>
> The Supreme Court has held that:
>
> when RSA 374:26 and RSA 374:22-g are read together, RSA 374:22-g must be construed to require the PUC to hold a hearing before deciding whether to allow a telephone utility to compete in the service area of another telephone utility. A contrary construction would defeat the legislative intent underlying RSA 374:22-g, which is to require the PUC to conduct a searching inquiry before determining whether it is consistent with the public good to allow more than one provider to provide telecommunications services in a single area.

Union Telephone, 160 N.H. at 319.

B. Federal Statutes

The Act facilitates CLEC entry into ILEC service territories by requiring all telecommunications carriers, including RLECs, to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a). All local exchange carriers, including RLECs, are also required to allow reasonable resale of their services, to port telephone numbers, to allow dialing parity with other telecommunications providers, to share access to rights of way with other telecommunications providers, and to establish reciprocal compensation with other providers. 47 U.S.C. § 251(b). RLECs are exempt from the requirements of sharing certain elements of their networks with other

telecommunications providers, 47 U.S.C. § 251(c), unless the FCC lifts that exemption. 47 U.S.C. § 251(f). To date, New Hampshire's RLECs continue to be exempt.

Concerning CLEC entry into incumbent service territories, federal law provides:

> **(a) In general**
> 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.
>
> **(b) State regulatory authority**
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> **(c) State and local government authority**
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> **(d) Preemption**
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.
>
> . . .
>
> **(f) Rural markets**
> It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214 (e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

> (1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251 (c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214 (e)(1) of this title; and
> (2) to a provider of commercial mobile services.

47 U.S.C. § 253.

C. Standards for Preemption

The Supremacy Clause of Article VI of the Federal Constitution gives Congress the power to preempt state law. *Union Telephone*, 160 N.H. at 320. State law is preempted where: (1) Congress expresses an intent to displace state law; (2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or (3) state and federal law actually conflict. *Id*. The first basis for preemption noted above allows Congress to define explicitly the extent to which its enactments preempt state law. *Mason v. Smith*, 140 N.H. 696, 699 (1996). In contrast, implied preemption may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Bliss v. Stow Mills, Inc.*, 146 N.H. 550, 553 (2001). Finally, an actual conflict exists when it is impossible for a private party to comply with both state and federal requirements, or, where state law stands as an obstacle to the accomplishments and execution of the full purpose and objective of Congress. *Union Telephone*, 160 N.H. at 320. Given the language of sections 253(a) and (d) of the Act, Congress has revealed a clear intent to displace state law. Moreover, though some specific matters are reserved to the states in other parts of section 253, they too may be preempted if, in their implementation, they create an actual

conflict with section 253(a). Accordingly, regardless of how the preemption is classified, state law will be preempted if, in its structure or implementation, it conflicts with federal law.

D. Commission Authority to Determine Whether State Law is Preempted

We first address our authority to determine whether state law may be preempted by federal law. Direct statutory authority to determine preemption comes from section 253(d) which, as noted, provides: "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." The "Commission" referenced in this section is the FCC. Accordingly, the Act does not provide affirmative federal statutory authority for this Commission to determine whether state and federal law conflict.

In examining the nature and extent of this Commission's authority, however, we note that the issue of federal preemption has been specifically remanded to the Commission from the New Hampshire Supreme Court. *Union Telephone*, 160 N.H. at 321. Therefore, the Commission has been given a mandate to make such a determination. Further, RSA 374:22-g, I, states that the Commission is to make any determinations about competition in telephone exchanges to "the extent consistent with federal law and notwithstanding any other provision of law to the contrary." For the Commission to make such determinations about consistency with federal law it must first know what is required by federal law.

When faced with the same question, the Wisconsin Public Service Commission noted that nothing in the Act states that the jurisdiction of the FCC under section 253(d) is exclusive,

and that Congress knew how to state its desire for exclusive jurisdiction under the Act when it so intended. *Re Sprint Communications Company, L.P.*, No. 6055-NC-103, 2008 WL 2787762 at *7 (Wisconsin Public Service Commission May 9, 2008). As stated by the Wisconsin Commission "If anything, § 253(d) appears to be intended to grant to the FCC the ability to initiate preemption proceedings in the absence of a private complainant." *Id*. In other words, § 253(d) does not deny any authority to the states to make a preemption determination. In accord with the Wisconsin Commission's decision, we conclude that this Commission is not precluded by section 253(d) and possesses appropriate jurisdiction to determine whether New Hampshire law is preempted by federal law.

E. Conflicts between New Hampshire and Federal Law Regarding CLEC Entry

As interpreted by the New Hampshire Supreme Court, RSA 374:26 requires that the Commission shall grant permission to act as a CLEC only after finding that engaging in such business will be for the public good. *Union Telephone*, 160 N.H. at 319. Such a finding is to be made after "due hearing," which need not be held if all interested parties are in agreement. RSA 374:26. RSA 374:22-g then describes the factors for the Commission to consider in making its public good determination. Also, as noted, section 253(a) of the Act provides that no state law or requirement may prohibit, or have the effect of prohibiting, the ability of any entity to provide any interstate or intrastate telecommunications service. *See Union Telephone,* 160 N.H. at 321; 47 U.S.C. § 253(a). In order to determine whether a state law prohibits or has the effect of prohibiting the provision of telecommunications services, courts, including the First Circuit, and the FCC, consider whether the law materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. *Union*

Telephone, 160 N.H. at 321. A prohibition does not need to be complete or insurmountable to run afoul of section 253(a). *Id.*

Turning to the parties' arguments about the scope of the proceeding for the purpose of clarifying our examination and decision, the RLECs contend that although there is testimony on entry barriers, the merits of competition and universal service, those are separate issues from the current inquiry. Further, they contend that this proceeding is not and should not be about "any particular RLEC territory or CLEC petition . . . whether entry barriers exist in New Hampshire . . . whether competition is a good thing for consumers . . . [or] whether possible implementations of RSA 374:22-g can be conjured in such a way that they amount to an outright prohibition against entry." RLECs' Initial Brief at 3. Instead, according to the RLECs, this proceeding is about "the comparison of state and federal statutes . . . whether any *state imposed* entry requirement rises to such a level that it is effectively an outright prohibition . . . [and] whether we can imagine any effective process in which [RSA 374:22-g] is *not* a prohibition." RLECs' Initial Brief at 3. In essence, the RLECs contend that this is a generic proceeding to compare the workings of the state and federal statutes only, and the actual or expected experiences of CLECs under the state scheme are not relevant. segTEL, in contrast, contends that this case is not about an outright prohibition on entry, but the *possibility* of outright prohibition, segTEL Reply Brief at 5-6, and that the experiences of CLECs are relevant to determine the existence of that possibility.

In general, the basic question involved in preemption claims under the Supremacy Clause is not one of interpretation of the Federal Constitution but one of comparing two statutes. *Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 13 (1st Cir. 2006) (*quoting N.J. Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 239 n. 2 (3d Cir. 2002)). While

we agree that a determination of preemption rests upon a comparison of the relevant statutes, and while we agree that no particular CLEC application is in issue here, to limit the inquiry in the manner proposed by the RLECs would be contrary to the mandate of the New Hampshire Supreme Court and may make it more difficult to decide the relevant issues.

The New Hampshire Supreme Court stated that because resolution of the matter may involve additional fact finding, the matter was to be remanded to the Commission for resolution in the first instance. *Union Telephone*, 160 N.H. at 321. We believe it therefore incumbent upon us to review the facts about the process under the present statutory scheme in order to judge whether preemption is warranted. While, the nature of this inquiry may properly reference individual experiences under the existing statutes, as a practical matter consideration of such evidence is not central to our analysis and decision in this case.

Turning to the arguments on the merits of preemption: "[i]t is well-established that § 253(a) 'authorizes preemption of state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications services.'" *Municipality of Guayanilla*, 450 F.3d at 16 (*quoting Nixon v. Mo. Mun. League*, 541 U.S. 125, 128 (2004)).

> As the Federal Communications Commission ("FCC") has explained, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. Courts have also noted that a prohibition does not need to be complete or "insurmountable" to run afoul of § 253(a).

Municipality of Guayanilla, 450 F.3d at 18 (citations and quotations omitted); *see also TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). The question, then, is whether

the state system erects a barrier that materially limits or inhibits the ability of any competitor or potential competitor to operate in a fair and balanced regulatory environment.

In the process of determining whether a competitor's entry will be for the public good, RSA 374:22-g requires the Commission to consider the interests of competition along with a non-exhaustive list of other items. The interests of competition have already been addressed by the New Hampshire legislature and by Congress. RSA 374:22-g, I, states that all telephone franchise areas are to be nonexclusive and § 253(a) of the Act requires that there can be no regulations that prohibit any entity from offering services. Moreover, the RLECs have conceded that the "interests of competition" consideration under RSA 374:22-g is already resolved in favor of promoting competition. RLECs' Reply Brief at 8.

As to the other factors, the one of greatest concern, as noted by NECTA and segTEL, is the incumbent's opportunity to earn a reasonable return. NECTA and segTEL have posited that such a consideration could result in rate case-like proceedings and involve a thorough review of the costs of the RLEC to determine the impact of CLEC entry on the RLEC's opportunity to earn a reasonable return, which would require extensive examination and customarily take many months to resolve. The RLECs contend that such a fear is exaggerated because the Commission's analysis need not delve into individual service costs. More specifically, they argue that the concern is not with rates "but only the *overall rate-of-return* of the incumbent, i.e. a *top-down* review of whether revenues cover costs, particularly sunk costs." RLECs' Reply Brief at 7 (emphasis in original).

Although the proceedings need not, in every instance, be overly detailed, it is likely that proceedings will require some degree of financial analysis. Further, even if the review is to be of

the nature described by the RLECs, it is not clear what happens if the overall rate of return is found to be insufficient as a result of competitive entry. Presumably, in such a case a CLEC's entry could be denied because allowing entry would negatively affect the RLEC's opportunity to earn a return. Taken to its logical conclusion, the state scheme could lead to the absurd result that inept competitors would be provided the opportunity to compete directly with an RLEC, because they would have minimal impact on the incumbent's opportunity to earn a reasonable rate of return, while adept competitors, who might take significant business away from the incumbent, would be barred from competing. Rejection based upon financial harm to the incumbent from a competent competitor is not only illogical, but is also clearly contrary to the dictates of section 253. Financial harm that may be experienced by the incumbent can be addressed through a rate case. The threat of financial harm cannot serve to deny entry to competitors.

Furthermore, the threat of financial harm is linked to the last factor identified by the legislature, that is, the incumbent's ability to recover any expenses incurred to benefit competitors while taking into account the proportionate benefit or savings, if any, derived by the incumbent. Analysis of the incumbent's expenses or the benefits derived from incurring those expenses is akin to that generally undertaken in a rate case and would involve detailed financial analysis normally undertaken to determine if the incumbent is realizing a reasonable return. Therefore, for the same reasons discussed above, we conclude that this factor is preempted.

We note that segTEL contends that the list of items to be considered by the Commission is not severable, either as a complete list, or as individual items, and consideration of all items must be preempted. We agree. The statute defines the scope of the Commission's review by

declaring that the Commission "shall" consider the factors in the non-exhaustive list provided. The use of the term "shall" is generally regarded by the New Hampshire Supreme Court as creating a mandatory duty. *See, e.g.*, *In re Cierra L.*, 161 N.H. 185, 188 (2010). Thus, the Commission is required to consider all items enumerated by the legislature and the preemption of one would appear to impact all. Even if the preemption of one factor does not undermine the others, however, we still find that the other factors set out in RSA 374:22-g, II are preempted, as discussed below.

Our duty under state law is to consider "fairness" but it is not clear whether we are to make that assessment from the perspective of the RLEC, the potential competitor, the consuming public, or some combination of them. Nor is it clear how to assess "fairness" to subsequent competitors after one has been granted authority to enter. It would not promote competition, for example, for a single competitor to be allowed entry but subsequent competitors rejected because their combined presence could have a greater impact on the incumbent. Further, wireless carriers may enter any territory without seeking Commission approval and without regard to whether it is "fair" to do so. Thus, the Commission may, even unintentionally, apply this factor in a manner that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Guayanilla*, 450 F.3d at 18. Accordingly, it is preempted.

Similarly, we conclude that judging the economic efficiency of a potential competitor's entry is preempted. Initially, it is not clear from the words of the statute how the Commission is to determine what is economically efficient. For example, the Commission has no means to decide whether the entry of a cable company, which offers services over its own facilities, is

more or less economically efficient than the entry of a provider that uses the incumbent's facilities to provide service. Even if that analysis may be done, to deny entry based on the supposed inefficiencies of a competitor denies that competitor the ability to improve its efficiencies, or prove that it can operate successfully without such efficiencies. Such a result is clearly contrary to the pro-competitive dictates of the federal scheme. The marketplace will be the ultimate determinant whether a competitor is operating in an economically efficient manner, and it is not for the Commission to make that determination in the context of that competitor's petition for entry.

Finally, as regards universal service and carrier of last resort obligations, we find that those factors are also preempted when determining whether competitive entry is in the public good. Although the federal scheme reserves limited areas of regulatory authority for the states, including the imposition of competitively neutral "requirements necessary to preserve and advance universal service" and "ensure the continued quality of telecommunications services" which may be equated with the carrier of last resort factor, it does not allow the states to prohibit competitive entry out of concern over universal service or carrier of last resort obligations.[1] With regard to consideration of carrier of last resort, that obligation is imposed upon ILECs and not upon competitive providers. As a result, consideration of the ILEC's carrier of last resort obligations, to ensure universal service, in a CLEC competitive entry application would risk the same varying results discussed in the context of the reasonable return factor. For this reason we find that the consideration of carrier of last resort obligations is preempted as a factor in deciding whether to allow competitive entry.

[1] As discussed below, such uniform competitively neutral requirements are appropriate for rulemaking but are not appropriate for case by case adjudicated determinations.

As the Supreme Court has noted, "the legislative intent underlying RSA 374:22-g, . . . is to require the PUC to conduct a searching inquiry before determining whether it is consistent with the public good to allow more than one provider to provide telecommunications services in a single area." *Union Telephone*, 160 N.H. at 319. The Stipulation of the parties details nine steps in an adjudicative process that would be required by RSA 374:22-g and RSA 374:26 if they are not preempted by federal law. Indeed, the process detailed in the Stipulation would provide for a "searching inquiry" that would typically take months and possibly a year or more to complete.[2] The end result would be a decision by the Commission on whether to allow competitive provision of telecommunication services in an RLEC service territory. Because we are preempted by federal law from answering that inquiry in the negative, and *must* allow competitive provisioning of telecommunications services in all areas of the state regardless of the Commission's consideration of any of the factors in RSA 374:22-g, II, it simply follows that a statutorily required process that could "have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" is likewise preempted by 47 U.S.C. § 253(a).

In addition to the above finding that RSA 374:22-g, II is preempted by section 253(a), we find that the application of RSA 374:26 is also preempted by section 253(a) in the context of a competitive telecommunications provider that seeks to enter an incumbent's territory. We find

[2] The experience of Comcast Phone of New Hampshire (Comcast) is illustrative. Comcast first requested authority to enter the territory of various rural subsidiaries of TDS Telecom (TDS) on December 12, 2007, which the Commission granted. TDS objected and requested a hearing pursuant to RSA 374:26; authorization was suspended pending the outcome of an adjudicated proceeding. Following discovery and briefing on whether Comcast's entry was consistent with the public good under RSA 374:22, RSA 374:22-g and RSA 374:26, the Commission granted Comcast's request on February 6, 2009. *See Comcast Phone of New Hampshire*, Order No. 24,938 (Feb. 6, 2009). Thus, the entry of a CLEC was denied for more than a year to determine whether its entry was consistent with the state statutory requirements.

RSA 374:26 to conflict with federal law only insofar as it addresses provision of telecommunications services by more than one carrier in a particular territory. We do not conclude that the state law is in conflict with, or preempted by, federal law as concerns electric, natural gas, water or any other utilities over which the Commission has jurisdiction, or in any situations not presented by the instant matter.

RSA 374:26 states that the Commission shall grant permission to engage in business when, after due hearing, it determines such engagement to be "for the public good, and not otherwise," and that a hearing need not be held when all interested parties are in agreement. RSA 374:22-g, I, also references the Commission's ability to authorize the providing of service when it is "consistent with the public good unless prohibited by federal law." In that we have concluded that the specific factors defining the public good set out in RSA 374:22-g, II are preempted by federal law we must refer to some other source to determine whether permitting competitive entry is for the public good as required by RSA 374:26 and RSA 374:22-g, I.

As noted above, section 253(a) of the Act requires that there can be no State statute, regulation or legal requirement that prohibits or has "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In enacting this federal statute, Congress determined that it is for the public good to allow more than one carrier to operate in any territory. RSA 374:26 provides that the Commission will grant permission to engage in business if it finds, after a "due hearing," that engaging in business will be for the public good. Because the public good determination has already been made by Congress, we conclude that no hearing is "due" and the requirements of RSA 374:26 in this context would impede the objective of the federal law. As the Supreme Court held "when RSA 374:26 and

RSA 374:22-g are read together, RSA 374:22-g must be construed to require the PUC to hold a hearing before deciding whether to allow a telephone utility to compete in the service area of another telephone utility." *Union Telephone*, 160 N.H. at 319. Because the Commission and any state law or requirement is preempted from deciding ***not*** to allow a telephone utility to compete in the service area of another telephone utility,[3] we find that RSA 374:26 is preempted as it would apply in this instance.

Our determinations that consideration of the factors in RSA 374:22-g, II and the application of RSA 374:26 are preempted under section 253(a) does not, however, end the inquiry because the regulations may yet be saved by section 253(b). Section 253(b) permits a state to "impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Section 253(b) excludes from the scope of the preemption powers granted to the FCC certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in section 253(b). *In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3460 (1997) at ¶ 41. In other words, section 253(b) preserves a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (1) "competitively neutral"; (2) consistent with the Act's universal service provisions; and (3)

[3] The one exception to this statement would be a denial based on competitively neutral requirements imposed by law or administrative rule pursuant to 47 U.S.C. § 253(b). The Commission already has adopted administrative rules, Parts Puc 430 through 449, which apply uniformly to all competitive local exchange carriers, that it has determined are "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Puc 431.02 specifically provides a competitively neutral basis for denying registration to an entity seeking to provide local exchange services in New Hampshire.

"necessary" to accomplish certain enumerated public interest goals. *Silver Star*, 12 F.C.C.R. 15639 at ¶ 40. The FCC has consistently construed the term "competitively neutral" as requiring competitive neutrality among the entire universe of participants and potential participants in a market. *In the Matter of Silver Star Telephone Company*, 13 F.C.C.R. 16356 at ¶ 10.

We conclude that the application of RSA 374:22-g, II, is not competitively neutral. The statute requires consideration of the impact on the incumbent from the presence of competition. The focus in the statute on injury to the incumbent is not competitively neutral with respect to, and as between, all of the participants and potential participants in the market. Further, there is nothing to indicate that the factors set out in the statute otherwise comport with the requirements of the statute that the regulations are consistent with the Act's universal service provisions or are necessary to accomplish the goals set out in section 253(b).

For the same reason, we conclude that RSA 374:26 is not saved by section 253(b). As noted, the FCC reads section 253(b) to permit a state to adopt requirements or a program necessary to preserve and advance universal service if such requirements or programs are competitively neutral and consistent with section 254 of the Act. *In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3460 (1997) at ¶ 41. In order for the Commission to impose requirements on a "competitively neutral basis" we note that under New Hampshire law, because such requirements would necessarily be of general applicability to all telecommunication service providers in the state, they would properly be imposed by administrative rule and could not be imposed in an adjudicated process on a case-by-case basis.[4]

[4] RSA 541-A:1 defines "Rule" as "each regulation, standard, form as defined in paragraph VII-a, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or

The Commission has relevant rulemaking authority pursuant to RSA 374:22-g, III, as well as RSA 365:8, VII and XII.[5] Accordingly, we will commence a rulemaking to address, in a competitively neutral manner, whether additional or modified requirements are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers in the context of competitive entry. Included in this rulemaking will be consideration of other changes to our rules necessary to ensure that the rules comport with the findings in this order and are otherwise appropriate for the registration of competitive telecommunications providers.

In line with this issue we also address the needs of potential market entrants in these unique circumstances for the duration when our administrative rules do not apply and where we have concluded that the relevant statutes are preempted. Creating a scheme of general applicability, such as a competitive entry petition requirement, would generally require the promulgation of administrative rules. The New Hampshire Supreme Court has explained, however, that "promulgation of a rule pursuant to the APA rulemaking procedures is not necessary to carry out what a statute demands on its face." *Nevins v. N.H. Dep't of Resources and Economic Dev.*, 147 N.H. 484, 487 (2002). RSA 374:22-g, I, states that the Commission:

> upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good unless prohibited by federal law.

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administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies . . . ."

[5] Rulemaking authority with regard to a state universal service fund, however, is restrained by RSA 374:22-p.

Thus, on its face, RSA 374:22-g, I permits the Commission, upon petition or its own motion, to authorize the providing of services when it finds that doing so is consistent with the public good. In that the public good determination has been made by Congress, as noted above, we may authorize the providing of services upon the filing of a petition or our own motion. Accordingly, until the adoption of new or amended rules, the Commission will accept petitions that meet the standards set out for petitions to enter non-exempt ILEC territories in the Commission's rules at Puc 431 for the authorizing of services in RLEC territories. We require that these petitions meet the requirements of our rules for entry to other territories to ensure that the relevant service providers are public utilities as defined in statutes and the Commission's rules, and to ensure that there is appropriate information to interact with the petitioning provider to address possible issues of consumer protection.

Finally, as noted, in their initial petition, the RLECs requested that the Commission declare null and void any CLEC certifications covering their territories that were not granted in accordance with the state statutory requirements. Initially, Staff determined that since 2008, nearly all carriers that were certified to operate in New Hampshire chose instead to limit their operations to the franchise territory of Verizon, which has since transferred its service territory to Northern New England Telephone Operations LLC d/b/a FairPoint Communications - NNE. *See* July 28, 2010 Staff Memorandum in Docket Nos. DT 09-198 and DT 10-183. Five carriers, however, had been granted statewide authority. July 28, 2010 Staff Memorandum in Docket Nos. DT 09-198 and DT 10-183. Three of those carriers either withdrew or amended their certifications, leaving only segTEL and Access Plus Communications as holding statewide certification. November 4, 2010 Staff Memorandum in Docket No. DT 10-183. Because we

have concluded that the state statutory scheme is preempted by federal law, we deny the RLECs' request to declare those two certifications null and void as to the RLEC service territories.

Based upon the foregoing, it is hereby

ORDERED, that RSA 374:22-g, II and, for the limited purpose of authorizing the provision of telecommunications services by more than one provider in a franchise area, RSA 374:26, as delineated herein are preempted by 47 U.S.C. §253.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of October, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director