

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

**Comcast Phone of New Hampshire, LLC
Request for Authority to provide
Local Telecommunications Services**

DT 08-013

**REPLY BRIEF OF COMCAST PHONE OF NEW HAMPSHIRE, LLC
ON THE PUBLIC GOOD OF ITS APPLICATION**

The final phase of this docket is narrowly focused on the single question of whether granting the application of Comcast Phone of New Hampshire, LLC (“Comcast Phone”) for entry as a competitive local exchange carrier (“CLEC”) in the territories of the Kearsarge Telephone Company and Merrimack County Telephone Company (the “TDS Companies”)¹ “is consistent with the public good.”² The necessary answer to that question is “yes.”

Over the course of this proceeding and in the evidence submitted as to the public good, Comcast Phone has submitted far more information and evidence to support its application than has ever been required of any other CLEC applicant in New Hampshire. Nevertheless, the TDS Companies and the New Hampshire Telephone Association

¹ While Comcast Phone has applied for authority to provide local exchange telecommunications in the territories of the Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, only the Kearsarge and Merrimack companies are interveners in this proceeding. Wilton Telephone Company has not intervened. It is party to the settlement approved in *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. And Merrimack County Telephone Co. Petitions for Approval of Alternative Form of Regulation*, DT 07-027, Order No. 24,852, Order Regarding Joint Settlement Agreement (April 23, 2008) (“Alternative Regulation Order”), and therefore has agreed not to oppose any application for CLEC certification within its service area.

² *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013, Order No. 24,887, Order Granting Hearing, 8 (Aug. 18, 2008) (“Hearing Order”).

(“NHTA”) jointly³ and Union Telephone Company (“Union Telephone”)⁴ contend that Comcast Phone has not met its burden. In addition, the TDS Companies and NHTA ask the Commission to carry out a broad investigation of the structure of competitive regulation⁵ before acting on what should be – at least after the repeal of RSA 374:22-f – a routine CLEC application no different from many others the Commission has granted without hearing.

As demonstrated in its initial brief,⁶ Comcast Phone’s unprecedented showing for a CLEC application provides ample evidence to show its application is in the public good under the standards established by the Legislature and the Commission. These standards place the burden on the incumbent carriers to present evidence within their knowledge and control to show why public policy favoring competitive entry should not apply here. This proceeding is not about what NHTA and the TDS Companies have selected as the reason to deny Comcast Phone’s application, VOIP regulation; the Commission already has stated twice that “the regulatory status of Comcast IP’s digital voice service is not the subject of this docket and does not bear on whether we should expand Comcast’s authority to operate in New Hampshire.”⁷ To hold Comcast Phone to a different, higher standard, impose unprecedented conditions, or undertake additional proceedings, would serve only to delay competitive entry further to the sole benefit of the incumbent carriers

³ *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013, Joint Brief of New Hampshire Telephone Association, Merrimack County Telephone Company and Kearsarge Telephone Company (filed Oct. 1, 2008) (“TDS/NHTA Brief”).

⁴ *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013, Initial Brief of Union Telephone Company (filed Oct. 1, 2008) (“Union Telephone Brief”).

⁵ TDS/NHTA Brief at 11-12.

⁶ *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013, Brief of Comcast Phone of New Hampshire, LLC on the Public Good of Its Application (filed Oct. 1, 2008) (“Comcast Phone Brief”).

⁷ Hearing Order at 6. *See also Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Prehearing Conference Transcript, at 33 (May 21, 2008).

and the detriment of thousands of consumers in the areas they serve. Comcast Phone's CLEC application is in the public good and should finally be approved.

I. The Strong Public Policy Favoring Competitive Entry Places The Burden on The Incumbent LECs to Come Forward With Evidence Why Comcast Phone's Application Should Not Be Granted.

Comcast Phone has presented evidence that its CLEC application is in the public good under standards established in RSA 374:22-g. Moreover, while it is not clear that the qualification standards of the more general franchising authority of RSA 374:26 also apply, Comcast Phone presented evidence that it meets these additional standards as well. Comcast's qualification has not been contested, and no party has made any showing of disqualification under Puc 431.02. Claims by the incumbents that Comcast Phone has failed to present sufficient evidence assume an impossibly high standard of proof that is inconsistent with the policy of RSA 374:22-g, and with Commission rules and regulations.

As discussed in Comcast Phone's initial brief, RSA 374:22-g was enacted with the legislative intent "to encourage competition for all telecommunications services" and, in its CLEC entry rules, the Commission implemented this overarching policy by striking "an appropriate balance between the interests of incumbent telecommunications providers and those of competitive entrants."⁸ In adopting these policies, the Legislature and Commission undoubtedly were aware of the state constitutional provision that the TDS Companies and NHTA cite in favor of "free and fair competition" and against

⁸ Comcast Phone Brief at 3-4 (quoting 1995 N.H. Laws 147:1; *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013, Order No. 24,887, Order Granting Hearing, 7 (Aug. 18, 2008)).

“monopolies” that “tend to hinder or destroy” competition.⁹ Union Telephone recognizes that 374:22-g requires balancing between “the interests of competition” on the one hand, and the various listed factors relating to the interests of incumbents on the other.¹⁰ The balance already struck by the Commission creates a presumption in favor of competitive entry. The burden is therefore on the incumbents to come forward with reasons why the legislative policy encouraging competition should not apply and why the Commission should strike a different balance from the categorical balance it struck in Puc 431.01-02.

This is especially the case where the factors relating to the interests of incumbents listed in RSA 374:22-g involve information within the knowledge and control of those incumbents.¹¹ To require a CLEC applicant to carry the burden on an incumbent’s return on investment, its universal service costs and funding, or its costs of interconnection would erect a monumental barrier to entry because it would require the CLEC to extract information from incumbents in order to apply for entry and necessitate extensive proceedings.¹² This is at odds with the streamlined entry enabled by Puc 431.01-2, and an open invitation to incumbent LECs to act as gatekeepers to entry – precisely the problem with the entry statute preempted in *Silver Star*¹³ and, Comcast submits, the reason the Legislature had the foresight to repeal RSA 374:22-f.¹⁴

⁹ N.H. Const., Pt. II, Art. 83.

¹⁰ Union Telephone Brief at 4.

¹¹ See RSA 374:22-g (citing as among factors to be considered in determining the public good, “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”).

¹² Given the highly confidential nature of much of the financial information that might be relevant, there is some question whether the financial information could or would be made available to Comcast Phone – a future competitor – even through discovery.

¹³ See *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd. 15639 (1997).

¹⁴ See An Act Relative to Service Territories Served by Several Telephone Utilities, 2008 N.H. Laws, Chapter 0350 (chaptering SB 0386, General Court 2008 Session (N.H. 2008)).

In any event, beyond providing ample evidence on the interests of competition, Comcast has submitted sufficient evidence on the additional factors set forth in RSA 374:22-g. First, Comcast Phone presented evidence from its expert, economist Michael Pelcovits, Ph.D., in support of “the incumbent utility’s opportunity to realize a reasonable return on its investment.”¹⁵ Dr. Pelcovits testified that “an efficient, well managed market incumbent should be able to respond to competitors and still recover a reasonable return on past and future investment,”¹⁶ as well as evidence that TDS’ parent company is a Fortune 500 Company and that TDS Companies’ affiliates are competing successfully in other states against Comcast Phone affiliates.¹⁷ There is no evidence in the record to refute Dr. Pelcovits’ testimony:

- Union Telephone argues, however, that the Commission must have before it additional evidence “specific to the incumbents” at issue.¹⁸ If there is some evidence that the well-known principles of economics do not apply to the TDS Companies in New Hampshire, the incumbents should come forward with it. Tellingly, the TDS Companies, with full access to their own financial information, did not try to argue specifically that competition from Comcast Phone as a CLEC would significantly affect their ability to recover a reasonable rate of return.¹⁹
- The ability of the TDS Companies involves projections of the impact Comcast Phone’s *future* services might have on the TDS Companies’ *future* ability to earn a reasonable rate of return. Comcast Phone has presented the best evidence on the subject – the informed judgment of an expert.
- Union Telephone’s attempt to draw a negative conclusion from a study performed by the New York Public Service Commission (“NYPSC”) is unconvincing. First, the NYPSC study has not been entered into evidence and

¹⁵ See Union Telephone brief at 6.

¹⁶ Comcast Phone Brief at 9-10.

¹⁷ Comcast Phone Brief at 10.

¹⁸ Union telephone Brief at 6.

¹⁹ The only related argument, that “[w]hen customers leave the TDS Companies, costs per customer rise,” TDS Companies and NHTA Brief at 10, is a general observation that does not speak directly to the ability to earn a reasonable rate of return. The argument that the regulated TDS companies are disadvantaged when competing against unregulated VoIP services, *id.*, similarly fails to directly address the ability to continue to earn a reasonable rate of return and, in any case, deals with the regulatory status of VoIP services, which is not under consideration in this proceeding.

is irrelevant on that basis alone. Second, on its facts the study is irrelevant because most New York RLECs studied faced greater competition from all sources than RLECs face in New Hampshire. By comparison, in Docket 07-027, the Commission found that “the record does not support a finding that competitive services are available to a majority of [MTC and KTC] customers.”²⁰ Third, where there was sufficient competition New York Public Service Commission granted relief in the form of alternate regulation (and did not grant relief to those RLECs that did not have competition); in New Hampshire RSA 374:3-b already affords the TDS Companies alternative regulation when and if they can show sufficient competition in their service areas.²¹

Second, Comcast Phone presented evidence that the TDS Companies are well-capitalized, receive substantial annual subsidies from the federal Universal Service Fund (“USF”) to undertake universal service and carrier of last resort obligations (including the Lifeline and LinkUp programs cited by TDS/NHTA witness Valerie Wimer), and have recently affirmed to the Commission in another proceeding their ability to preserve universal service access and serve as the carrier of last resort, even in the presence of competitive services.²² Union Telephone makes a series of conclusory arguments that Dr. Pelcovits’ reliance on these facts is unjustified:²³

- Union Telephone argues that Dr. Pelcovits’ conclusion relies on TDS Companies testimony “filed at least eight months prior to Comcast’s petition,” but neither Union Telephone nor the TDS Companies suggest any changes in the condition of the TDS Companies that would cause the testimony to be unreliable. It is reasonable for an expert to rely on admissions to the Commission from the companies at issue, and Dr. Pelcovits did not rely solely on these admissions, but also considered the financial status of the TDS Companies parent company and the substantial payments to the TDS Companies from the federal USF.
- Second, Union Telephone complains that the TDS Companies’ more than \$2.4 million in USF subsidies last year should be discounted as evidence because

²⁰ Alternative Regulation Order at 29-30.

²¹ Alternative Regulation Order at 30.

²² Comcast Phone Brief at 10.

²³ Union Telephone Brief at 9-10.

“funding from the Federal High Cost Universal Service Fund is based upon costs and does not increase to respond to loss of revenues due to additional competition.”²⁴ But as the TDS Companies and NHTA explain, “[w]hen customers leave the TDS Companies [for competitors], costs per customer rise” and that “[w]hile some costs may decrease due to access line losses, ILECs such as [the TDS Companies] must continue to provide service to all customer locations.”²⁵ Since USF subsidies are based on costs, they should continue to absorb any higher costs attributable to providing universal services in high cost rural areas.

- USF subsidies are provided to rural carriers to ensure that “that consumers in all regions of the nation have access to and pay rates for telecommunications services that are reasonably comparable to those services provided and rates paid in urban areas.”²⁶ Rural carriers all over the country face competition from CLECs and other carriers while receiving USF High Cost Program support that enables them to perform universal service and carrier of last resort responsibilities. There is no reason to believe the USF program, which adequately supports rural carriers throughout the nation (including affiliates of the TDS Companies in other states) in the face of competition, would be inadequate to support the TDS Companies in New Hampshire as they face competition from Comcast Phone as a CLEC.

In its brief, Union Telephone supports its argument on an applicant’s burden by citation to *Long Distance North*.²⁷ This a case from 1990 – predating either RSA 372:22-g²⁸ or the federal Telecommunications Act of 1996,²⁹ much less CLEC entry regulations in former Puc Part 1300 or the current regulations in Puc 431.01-02. Union Telephone’s reliance on such outdated precedent shows the extent to which the entry process the rural incumbents urge in this case is a throwback to a different era of telecommunications regulation. The Commission should not accept the imposition of any greater, special barriers to Comcast Phone’s entry into the TDS Companies’ territories than it has already, and should act now granting the requested CLEC authority.

²⁴ Union Telephone Brief at 9.

²⁵ Union Telephone Brief at 10.

²⁶ Universal Service Administrative Company, High Cost Program, Overview of the Program, at <http://www.usac.org/hc/about/default.aspx>.

²⁷ Union Telephone Brief at 5 (citing *Long Distance North of New Hampshire, Inc.*, NH PUC Docket DE 87-249, Order No. 19,698 (February 2, 1990)).

²⁸ 1995 N.H. Laws 147:1.

²⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

II. Broad Questions about Appropriate Regulatory Treatment of VoIP Services or New Rules for “Fair and Equitable Competition” Are Outside of the Scope of This Hearing.

The TDS Companies and NHTA continue their relentless effort to expand the scope of this proceeding into a review of appropriate regulatory treatment for VoIP services, explore whether competition from VoIP services is “fair competition,” and impose special restrictions on the scope of services Comcast Phone may offer now or in the future. These issues are outside of the scope established by the Commission and would serve only to further delay what is already the longest-running CLEC application proceeding in New Hampshire at least since the enactment of RSA 374:22-g. “Free and fair competition” under Article 83 of the New Hampshire Constitution hardly means no competition at all.

The TDS Companies and NHTA conclude at one point that “[a]bsent the Commission providing a level regulatory playing field and allowing ‘fair competition’, the evidence does not support” a finding of public good for Comcast Phone’s CLEC application.³⁰ Throughout their brief, the TDS Companies and NHTA complain of disadvantages the ILEC may face in competing against “a completely unregulated entity,”³¹ an obvious reference to the VoIP services that may be offered in the TDS Companies territory by Comcast Phone’s affiliate Comcast IP. Comcast Phone has freely acknowledged its intention to provide wholesale services to Comcast IP in the TDS Companies territory.³²

³⁰ TDS/NHTA Brief at 11.

³¹ TDS/NHTA Brief at 10.

³² Although Comcast description of its proposed offerings included its wholesale Local Interconnection Service (“LIS”), Comcast Phone stipulated that it is not seeking certification on the basis of this offering in light of Commission policy that wholesale service is not subject to certification in New Hampshire. *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Stipulated Facts (June 12, 2008). As stated in its Brief filed June 26,

The Commission in turn has made clear that “the regulatory status of Comcast IP’s digital voice service is not the subject of this docket and does not bear on whether we should expand Comcast’s authority to operate in New Hampshire.”³³ In fact, asymmetry in regulatory treatment of competitive voice, video, and data services is common. Dominant ILECs are regulated differently from non-dominant CLECs, which are regulated differently from cell phone providers. Heavily regulated cable companies compete against lightly regulated satellite services – as Comcast Cable does against the TDS Companies’ Dish Network service, offered to its subscribers in the New Hampshire territories at issue³⁴ – and both cable and satellite service compete against unregulated video services offered via the Internet. The registration of a CLEC, a routine proceeding ordinarily not subject to briefing or adjudicative hearings,³⁵ is not the occasion to address the cosmic questions of convergence of these regulatory schemes. The incumbents are

2008, Comcast Phone accepts that policy for purposes of this proceeding but restates its view that LIS also qualifies the company for certification as a CLEC. The Federal Communications Commission declared that “common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.” *Time Warner Cable Request for a Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd. 3513, ¶ 12 (2007). In the same order, the FCC elaborated that “the rights of telecommunications carriers under sections 251 (a) and (b) apply regardless of whether the telecommunications services are wholesale or retail, and a state decision to the contrary is inconsistent with the Act and Commission precedent.” *Id.* ¶ 14. Moreover, because under RSA 362:2 a utility service is a service “ultimately sold to the public,” it need not be offered directly to retail end-users. Wholesale carriers provide service “ultimately sold to the public” by providing service to carriers who offer service to end-users. RSA 362:2. *See also Bright House Networks, LLC v. Verizon California, Inc.*, File No. EB-08-MD-002, Memorandum Opinion and Order, FCC 08-159, ¶¶ 30-33 (rel. June 23, 2008) (holding that provision of local number portability service “is a wholesale input that is a necessary component of a retail telecommunications service” and is therefore a telecommunications service for purposes of 47 U.S.C. § 222(b)).

³³ Hearing Order at 6.

³⁴ *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Direct Testimony of David J. Kowolenko on Behalf of Comcast Phone of New Hampshire, LLC, at 7 (Sept. 9, 2008); *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Direct Testimony of Michael D. Pelcovits on Behalf of Comcast Phone of New Hampshire, LLC, at 10-11 (Sept. 9, 2008).

³⁵ *See* Puc 431.01.

free at any time to petition the appropriate regulatory authority to address such issues without holding Comcast Phone's CLEC application hostage.³⁶

Simply put, as demonstrated in Comcast Phone's initial brief,³⁷ there is no basis in statute or regulations for the Commission to impose the onerous conditions and limitations proposed by the NHTA and TDS Companies on the services that Comcast Phone would be allowed to offer. Such conditions could amount to a prohibited barrier to competitive entry. Consequently, the Commission should disregard any recommendation for conditional approval of Comcast Phone's application, and approve its application without limitation.

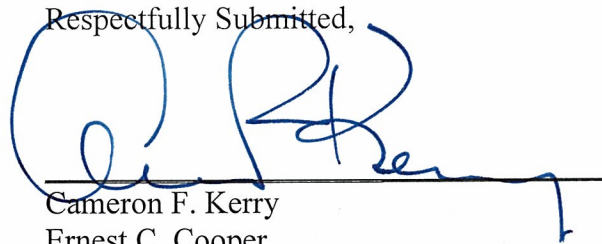
³⁶ Hearing Order at 6.

³⁷ Comcast Phone Brief at 13-15.

CONCLUSION

As described above and in Comcast Phone's initial brief and pre-filed testimony, Comcast Phone's application for authorization as a CLEC in the territory of the TDS Companies is in the public good. Comcast Phone's application therefore should be approved without further delay.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "C. Kerry", is written over a horizontal line.

Cameron F. Kerry
Ernest C. Cooper
Mintz, Levin, Cohn, Ferris, Glovsky,
and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
Tel. (617) 542-6000
Fax (617) 542-2241

Brian A. Rankin
Vice President and Deputy General Counsel
Chief Telephony Counsel
Comcast Phone of New Hampshire LLC
One Comcast Center
Philadelphia, Pennsylvania 19103
Tel. (215) 286-7325
Fax (215) 286-5039

Attorneys for Comcast Phone of
New Hampshire, LLC

October 10, 2008