

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

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

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) **DT 08-013**
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**OBJECTION OF COMCAST PHONE OF NEW HAMPSHIRE, LLC
TO MOTION BY TDS COMPANIES FOR SUSPENSION OF
ORDER NO. 24,843 PENDING RESOLUTION OF DOCKET DT 07-027
OR, ALTERNATIVELY, FOR A HEARING**

Comcast Phone of New Hampshire, LLC (“Comcast Phone”) opposes the Motion by TDS Companies for Suspension of Order No. 24,843 Pending Resolution of Docket DT 07-27 or, Alternatively, For a Hearing (filed April 16, 2008) (“the TDS Motion to Suspend”).

Comcast opposes the TDS motion on the assumption that the issuance of Order No. 24,852 on April 23, 2008 does not moot the TDS Motion to Suspend. The TDS Motion to Suspend asked to extend the effective date of Order No. 24,843 until “one week following the entry of an order of the Commission approving, without modification, the Settlement Agreement executed by the TDS Companies in Docket No. 07-027.”¹ As noted by the New Hampshire Telephone Association, of which the TDS Companies comprise several members and which is represented by the same counsel as the TDS Companies, certain issues may become moot upon approval of that settlement.²

¹ TDS Motion to Suspend at p. 5.

² Objection by the New Hampshire Telephone Association to Order *Nisi* Granting Application and Request for Hearing at p. 8, n. 4 (filed April 21, 2008)(“NHTA Objection”).

In Order No. 24,852, the Commission approved the settlement as to the Wilton and Hollis companies but not the Merrimack and Kearsarge companies. It found insufficient evidence of competitive alternatives in certain Merrimack and Kearsarge exchanges, but "will keep the docket open in the Kearsarge and Merrimack petitions for one year and encourage those companies to reduce market barriers by not opposing CLEC registrations, waiving the rural exemption and expediting interconnection negotiations, as proposed in the settlement." Order No. 24,832 at p. 30. Such evidence may include evidence of Comcast's certification. *Id.* at pp. 30-31.

While the TDS Companies have not informed Comcast whether they intend to heed the Commission's encouragement or to interpose barriers to competition, the alternative relief sought in the TDS Motion to Suspend unequivocally takes the latter course. Comcast Phone therefore opposes the motion, since it would impose entry barriers on Comcast unlike those for any other CLEC and delay competition.

I. The TDS Companies' Position on Comcast Phone's Application to Expand Its Service Territory Was Not Conditional.

Comcast Phone filed a letter with the Commission on January 28, 2008, asking the Commission to approve its CLEC-10 application for authority to provide local exchange service in territories of the TDS Companies.³ Although CLEC-10 applications ordinarily do not require service or public notice and are acted on within a matter of a few weeks, at the request of Commission Staff Comcast sought out TDS's position; accordingly, in its January 28 letter, Comcast Phone was "authorized to state that the TDS Companies take no position on this request."⁴ In a letter filed in response, the TDS Companies then went to lengths to point out that their settlement agreement in Docket

³ Letter to Debra A. Howland from Cameron F. Kerry (filed January 28, 2008).

07-027 had not yet waived the right to oppose CLEC applications or its rural exemption,⁵ even though Comcast's letter described the settlement as "pending" and – at least five times – as "proposed."⁶

Notwithstanding these pains to make sure the record was clear on this and other issues, the TDS Companies confirmed unconditionally that "[t]he TDS Telecom Companies advised counsel for Comcast that they took no position on that request."⁷ That was their entire statement of position on Comcast Phone's application. The Commission concluded correctly on this basis that "the TDS Companies noted their lack of an objection to Comcast's request for CLEC registration." Order No. 24,843 at p. 2. Even though the TDS Companies were not bound by their proposed settlement agreement not to object to any CLEC applications, they did not object to Comcast's application even though they were offered the opportunity to do so.

II. There Is No Basis To Treat Comcast Phone Differently From Other CLECS And Delay Competition.

Puc 431.01 does not envision the kind of elaborate tariff proceeding or investigation of the offerings of a CLEC that TDS (much less NHTA) proposes. Even under the more extensive process of former Puc Rule 1300, the Commission routinely granted CLEC status to competitive carriers as provided for in RSA 374:22 statute and Puc 431.01.⁸ While, as with all orders *nisi*, the Commission affords an opportunity to request a hearing on a CLEC application before the order takes effect, hearings have

⁴ *Id.* at p. 2.

⁵ Letter to Debra A. Howland from Frederick C. Coolbroth (filed January 31, 2008).

⁶ Letter to Debra A. Howland from Cameron F. Kerry, *supra*, at pp. 1, 2.

⁷ Letter to Debra A. Howland from Frederick C. Coolbroth, *supra*, at p. 2

⁸ See, e.g., *UCN, Inc., Petition for Authority to Provide Facilities Based Competitive Local Exchange Services and to Operate as a Reseller of Telecommunications Services*, DT 05-052, Order No. 24,456, Order *Nisi* Granting Authorization (April 15, 2005).

rarely, if ever, been requested or held on the grant of CLEC authorization orders.⁹ By repealing Rule Puc 1300 and substituting simple registration under Puc 431.01, the Commission streamlined entry regulation and opted to expedite competition in New Hampshire by regulating conduct rather than entry.

The TDS Companies propose an unprecedented level of entry regulation that is inconsistent with this scheme. The TDS Motion to Suspend seeks an extensive evidentiary investigation into the nature of the services to be offered by Comcast Phone – what kind of access service Comcast will provide, whether Comcast will continue to provide residential service after its discontinuance of service pursuant to 47 U.S.C. § 214, whether it intends to provide business service, and the structure for providing VOIP service. TDS Motion to Suspend at 3-4. The NHTA filing includes the same suggestions at greater length and expands them by calling not only for investigation of:

the actual services to be offered to residents of the State of Hampshire, the prices for such services, the manner in which such services will be provided, the nature of any interconnection agreements to be sought, what regulatory agency (if any will assert jurisdiction over customer complaints, and what entity (if any) will be an eligible telecommunications carrier under the [Telecommunications] Act,¹⁰

but also for:

determin[ation of] other regulatory compliance issues - such as (without limitation) lifeline and link-up compliance, number portability

⁹ See, e.g., *UCN, Inc., Petition for Authority to Provide Facilities Based Competitive Local Exchange Services and to Operate as a Reseller of Telecommunications Services*, DT 05-052, Order No. 24,456, Order Nisi Granting Authorization (Apr. 15, 2005); *France Telecom Corporate Solutions LLC, Petition for Authority to Provide Non-Facilities Based CLEC Services*, DT 05-021, Order No. 24,454, Order Nisi Granting Authorization (Apr. 7, 2005); *Southwestern Bell Communications Services Inc. d/b/a SBC Long Distance, Petition for Authority to Provide Facilities Based Local Telecommunications Services*, DT 04-012, Order No. 24,380, Order Nisi Granting Authorization (Oct. 6, 2004); *KMC V Telecom V, Inc., Petition for Authority to Provide Local Telecommunications Services*, DT 03-202, Order No. 24, 339, Order Nisi Granting Authorization (June 21, 2004). *But cf.* *ACN Communications Services, Inc.*, DT 04-042, Order No. 24,491, Request for Hearing and Reconsideration, (July 21, 2005) (discussing a request for hearing filed by a CLEC denied authorization under RSA 374:22-g).

¹⁰ NHTA Objection at 4.

compliance, ... customers [sic] privacy and ... Customer Proprietary Network Information related issues, and quality of service measurements
....¹¹

This imaginative array of issues – though “not meant to be exhaustive”¹² – overreaches any entry, tariff, or service regulation under New Hampshire law or regulations. There is no basis to delay entry in order to address such issues in the abstract (even assuming any of them need to be addressed with regard to a non-dominant carrier). Under the Commission’s *nisi* order, Comcast Phone has two years in which to begin providing service within the TDS territories and thereby establish concrete conduct. Like any other CLEC in the same position, Comcast Phone’s offering is submitted “for informational purposes only” and may be revised at any time, and thus may change between the time of filing its CLEC-10 and the time of beginning to provide service. *See* Puc 431.06(e)(i) (CLEC rate schedules maintained and on file for “informational purposes only”); Puc 431.08(a) (CLECs may change prices and services on one day’s notice). It is therefore irrelevant that, for example, Comcast Phone’s discontinuance of service to residential customers subsequent to filing its CLEC-10 leaves in place only the business offering in Comcast Phone’s Schedule of Rates and Charges issued April 30, 2007 and effective May 1, 2007, and attached to its CLEC application.¹³ The Commission can address any questions raised in the event Comcast Phone fails to provide service within two years, refuses service to a customer under the terms of a

¹¹ *Id.*

¹² *Id.*

¹³ *See Application of Comcast Phone of Massachusetts, Inc., Comcast Phone of New Hampshire, LLC, Comcast Phone of Ohio, LLC, and Comcast Phone of Pennsylvania, LLC to Discontinue Domestic Telecommunications Services*, FCC WC Docket No. 08-45, Comp. Pol. File No. 857 (filed Feb. 20, 2008). As provided in this notice of discontinuance, Comcast Phone is discontinuing telecommunications service to residential end users tomorrow, April 29, 2008. Accordingly, Comcast is filing today a revised Schedule of Rates and Charges that is effective April 29, 2008 and reflects that this residential telecommunications service will no longer be offered.

service offering, or otherwise suggests non-compliance with obligations of competitive carriers. Consistent with New Hampshire's market-based approach to CLEC regulation, the Commission should not waste time and resources entertaining abstract claims prior to entry.

The wide-ranging investigations envisioned by the TDS Companies (and NHTA in its subsequent filing) can have only one purpose: to erect a massive regulatory barrier to entry that delays competitive entry in the TDS territories. Such delay may serve the interests of the TDS Companies and other rural ILECs, but it does not serve the public good. It would frustrate the Commission in carrying out its role under the federal Telecommunications Act "to open the local exchange and exchange access markets to competition." *Order No. 23,738, Bell Atlantic Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, DE 97-171, Order Granting in Part and Denying in Part, p. 2 (July 6, 2001).

III. No Statute, Regulation, or Policy Calls for a Hearing.

In acting on matters such as Comcast Phone's application, the Commission's standard practice has been to issue orders *nisi*.¹⁴ Such orders typically become effective at some future date and provide an opportunity for "all persons interested in responding" to the order to "submit their comments or file a written request for a hearing."¹⁵ The Commission has made clear that this opportunity to request a hearing does not create any right to a hearing. The Commission regularly denies such hearing requests when it

¹⁴ See, e.g., *Petition for Authority to Provide Non-Facilities Based Local Telecommunications Services*, DT 04-081, Order No. 24,415, Order *Nisi* Granting Authorization (Dec. 29, 2004).

¹⁵ *Id.* at 4.

determines they are not warranted.¹⁶ In particular, a request for hearing on an order *nisi* may be denied by the Commission on the basis that, as here, all issues raised by a request for hearing can be resolved as a matter of law.¹⁷

The PUC's interpretation of Puc 431.01 was an interpretation as a matter of law of the reference to "non-exempt ILECs" in Puc 431.01(d) that avoids conflict with federal law.^{18/} The issue before the Commission in reviewing Comcast's application was limited to whether this reference exclusively limits the grant of a certificate. The PUC concluded that it does not, finding that "Puc 431.01(d) does not expressly limit CLEC registrations to non-exempt ILEC service territories."¹⁹ The Commission therefore applied the same entry requirements to Comcast Phone as for any other CLEC under RSA 374:22-g. The PUC has the authority to make such a ruling without a hearing.²⁰

The PUC's waiver of Puc 431.01(d) "to the extent necessary"²¹ does not require a hearing record as the TDS Companies suggest. PUC rules allow waiver of any rule if,

¹⁶ See, e.g., *West Epping Water Company*, DW 01-054, Order No. 24,330, Response of Paul R. Wright on Order No. 24,309 Order Ruling on Request of Paul R. Wright (Jan. 29, 2001) (denying a hearing request because the requestor had "not raised any issues that cause us to reconsider our decision"); *Public Service Company of New Hampshire, Special Contract No. NHPUC-98 with Freudenburg-NOK General Partnership*, DR 94-252, Order No. 23, 627, Order Denying Hearing (Jan. 29, 2001) (denying a hearing request because the Commission found "no basis, either required by law or by the facts at issue, to hold a hearing on this matter"); *Birchview by the Saco, Inc. Investigation into Quality of Service and Future of Water Supply and Distribution System*, Order No. 23,235, Order Denying Request for Hearing Regarding Rates (June 15, 1999).

¹⁷ *Birchview by the Saco, Inc. Investigation into Quality of Service and Continued Operation as a Viable Public Utility*, DE 97-255, Order No. 23,628, Order Denying Request for Hearing on 2001 Rates and Fees, at p. 14 (Jan. 29, 2001).

¹⁸ See *Silver Star Telephone Co., Inc. Petition for Preemption and Declaratory Ruling*, FCC 97-336, 12 F.C.C.R. 15639 (Sept. 24 1997), *aff'd* FCC 98-205, 13 F.C.C.R. 16346, at ¶3 (Aug. 24, 1998)

¹⁹ Order No. 24,843 at 3.

^{20/} *N.H. York Co. v. Titus Constr.*, 219 A.2d 708, 710 (N.H. 1966)(summary disposition a 'device to make possible the prompt disposition of controversy on the merits without a . . . [hearing] . . . , if, in essence, there is no real dispute as to the salient facts or if only a question of law is involved"); *accord, Nashua Trust Co. v. Sardonis*, 136 A.2d 332, 333 (N.H. 1957). See *Consolidated Proceedings Relating to Payment of Reciprocal Compensation for Calls Terminated to Internet Service Providers*, DT 99-081 and DT 99-085, Order No. 24, 238, Order on Motions for Summary Judgment, at p. 6 (Nov. 12, 2003); *Global NAPS, Inc. & New England Voice and Data Reciprocal Compensation*, DT 99-081 and DT 99-085, Order No. 23,444, Order on Scope and Discovery Matters, at p. 24 (Apr. 21, 2000).

among other situations, “[c]ompliance with the rule would be . . . inapplicable given the circumstances”²² As required by the rule,²³ Comcast submitted the request for waiver of Puc 410.01(d) in writing and specified the basis for the waiver. As noted above, Comcast specifically approached the TDS Companies about its request, and they did not object or suggest then that a hearing record was necessary.²⁴ The Commission has often granted a waiver without a hearing.²⁵

The TDS Companies imply that RSA 374-22-e requires a hearing but disregard the language in the previous subsection that predicates such a hearing on an “application by one or both of the affected utilities, [to] define, alter, or establish service territories.”²⁶ No TDS Company has made any such application, so RSA 374-22-e does not apply. It would be subject to federal preemption if it did,²⁷ but the Commission avoided reading into PUC 431.01(d) a limitation on competitive entry that “would raise issues of federal preemption.”²⁸ Instead, the Commission read into RSA 374:22 in general the standard under RSA 374:22-g, considering “the public good and, more specifically, the interests of competition, fairness, economic efficient, universal service, and carrier-of-last obligations.” Order No. 24,843 at 3. This is the same standard the Commission has

²¹ Order No. 24,843 at pp. 3-4.

²² Puc 201.05(b).

²³ Puc 201.05(c), (e).

²⁴ See *Comcast Phone of New Hampshire, LLC Request for Approval of Form CLEC-10*, at 3-4 (Jan. 28, 2008).

²⁵ See, e.g., *Concord Steam Corporation Rate Proceeding*, DG 07-076, Order No. 24,796, Order approving Temporary Rates, at p. 8 (Oct. 24, 2007); *Dunbarton Telephone Company Petition for Authority to Refinance Outstanding Debt*, DT 04-153, Order No. 24,384, Order Nisi Granting Authority to Refinance Outstanding Debt, at pp. 3-4 (Oct. 8, 2004); *NUI Telecom, Inc. Petition for Authority to Provide Local Telecommunications Services*, DT 01-250, Order No. 23,960, Order Nisi Granting Authorization, at pp. 3-4 (May 1, 2002).

²⁶ RSA 374:22-e.

²⁷ Perhaps recognizing that federal law preempts ILEC veto power over competitive entry, the TDS Companies, while reserving the right to the rural exemption, do not assert that the PUC failed to consider factors under RSA 374:22

²⁸ Order No. 24,843 at pp. 3.

applied to other competitive entry; RSA 374:22-g does not contain any hearing requirement, and the Commission has permitted CLEC entry under that statute routinely without hearings.²⁹

Finally, under the Commission's Order, there is no need to address the federal rural exemption at this stage.³⁰ Order No. 24,843 states "our ruling is not intended to affect TDS's right to assert the 'rural exemption'" under federal law, and the TDS Companies reserve their rights in this regard.³¹ While the federal rural exemption merely limits interconnections obligations and does not insulate TDS (or other NHTA members) from competition altogether, the scope of those obligations can be determined in a waiver proceeding or arbitration if it arises. There is no basis to require that such issues be resolved before the authorization that enables Comcast Phone to trigger these processes. *Cf.* 47 U.S.C. 541 (f)(1)(B) ("party making a bona fide request ... for interconnection" may seek termination of exemption).

Conclusion

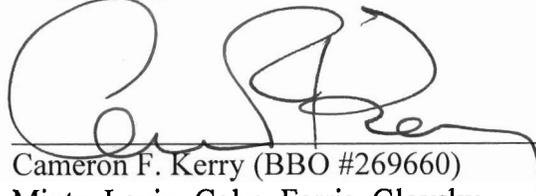
For the foregoing reasons, Comcast Phone submits that there is no basis to delay competitive entry in the territories of the TDS Companies any further. The Commission should leave the effective date of Order No. 24,843 in place and deny the TDS Companies' request to suspend this order or convene a hearing.

²⁹ See text at notes 8-9, *supra*.

³⁰ TDS Motion to Suspend at p. 4, ¶ 12.

³¹ Order No. 24,843 at 3

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Kerry', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Cameron F. Kerry, hereby certify that I have this 28th day of April, 2008, served the foregoing document, Objection of Comcast Phone of New Hampshire, LLC to Motion by TDS Companies for Suspension of Order no. 24,843 Pending Resolution of Docket DT 07-027 or, Alternatively, for a Hearing; by email, on all parties of record:

A handwritten signature in black ink, appearing to read 'Cameron F. Kerry', written over a horizontal line.

Cameron F. Kerry

April 28, 2008