

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

Comcast Phone of New Hampshire, LLC
Application for Authority to Serve
Customers in the TDS Service Territories

DT 08-013

**RESPONSE OF COMCAST PHONE OF NEW HAMPSHIRE, LLC
TO THE JOINT MOTION FOR REHEARING AND/OR RECONSIDERATION
BY NEW HAMPSHIRE TELEPHONE ASSOCIATION, MERRIMACK COUNTY
TELEPHONE COMPANY, KEARSARGE
TELEPHONE COMPANY AND WILTON TELEPHONE COMPANY, INC.**

A lot of history has unfolded since Comcast Phone of New Hampshire, LLC (“Comcast Phone”) filed its application for certification in this proceeding on December 12, 2007.^{1/} The State of New Hampshire conducted a dramatic presidential primary. The nation nominated, elected, and inaugurated its first African-American president. Bear Stearns and Lehman Brothers foundered, the federal government stepped in to Fannie Mae, Freddie Mac, and AIG, and the global economy unraveled more than a decade of growth. “Slumdog Millionaire” introduced much of the world to the streets of Mumbai and swept the Oscars.

In the areas served by the TDS Companies^{2/} in New Hampshire, though, little has changed. The TDS Companies have succeeded in protecting their local monopoly and forestalling competition. From the outset of this proceeding, the Commission has made clear

^{1/} In the Form CLEC-10 application submitted to the Commission on December 12, 2007, Comcast Phone sought permission to offer competitive local exchange service to residents within the service territory of Kearsarge Telephone Company (“KTC”), Merrimack County Telephone Company (“MCT”), and Wilton Telephone Company (“WTC”), as well as Hollis Telephone Company (“HTC”), which is not a party to this proceeding.

^{2/} The term “TDS Companies” shall be used herein to refer to KTC, MCT and WTC collectively. The term “RLEC Representatives” refers to all of the parties to the joint motion – the TDS Companies along with the New Hampshire Telephone Association (“NHTA”) – collectively.

that issues of VoIP jurisdiction or regulation are questions for a different proceeding.^{3/}

Nevertheless, the TDS Companies continue to insist that a routine matter of entry authority must be linked to regulation of VoIP services, but now (and only now) that this proceeding has played out in a way that does not benefit TDS, they suggest the Commission should commence a different proceeding.^{4/} The Commission also has made clear that qualification as a common carrier is based on the undertaking to serve some segment of the public without discrimination,^{5/} but the TDS companies persist in their claim that Comcast Phone's undertaking to provide its posted services to anyone who requests them is not service "to the public," and they have forced yet another proceeding by denying to Comcast Phone the interconnection necessary to offer competitive service in the TDS territories.^{6/} Meanwhile, retail customers in those territories still do not have access to competitive choices.

^{3/} First, at the pre-hearing conference in this matter, Chairman Getz acknowledged that "jurisdictional issues" about other operations of Comcast "would not be part and parcel to this CLEC application ... [but] would be something we would deal separately from the issue of whether they should be qualified as a CLEC in New Hampshire." *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) (hereinafter "Prehearing Tr."). Then, in its order granting a hearing, the entire Commission made clear that the regulatory status of Comcast's digital voice service was "not the subject of this docket and does not bear on whether we should expand Comcast's authority to operate in New Hampshire." *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Order Granting Hearing, Order No. 24,887, at 6 (Aug. 18, 2008) (hereinafter the "Aug. 18th Order"). Finally, in the final order on which the TDS Companies now seek rehearing or reconsideration, the Commission reiterated that "[w]hether or not . . . VoIP services are regulated does not impact the fairness of Comcast [Phone]'s entry into the TDS Companies' territories." *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Order Granting Authority, Order No. 24,938 (Feb. 6, 2009) (hereinafter, the "Feb. 6th Order")

^{4/} On the same day that the RLEC Representatives filed their Joint Motion, the NHTA's individual members, including KTC, MCT and WTC, submitted a petition to the Commission pursuant to RSA 365:5 requesting an independent inquiry into the regulatory status of VoIP services.

^{5/} In the Aug 18th Order, the Commission ruled that Comcast Phone's CLEC-10 application qualified it for certification in the TDS Territories based on Comcast Phone's "representation that its CLEC-10 describes services that will be offered in the TDS territory." Aug 18th Order, at 6. As elaborated below at p. 5, this interpretation of what it means to be a telephone carrier is consistent with *Appeal of Paul Zimmerman*, 141 N.H. 605, 609 (N.H. 1997).

^{6/} See *Comcast Phone of New Hampshire d/b/a Comcast Digital Phone, Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS Companies*, Docket No. DT 08-162, in which the sole issue is the TDS Companies' refusal to complete an interconnection agreement based on the assertion that Comcast Phone is not a "telecommunications carrier" under applicable law.

It is time for the Commission to put the final end punctuation on this already too prolonged proceeding. The Commission should act promptly to deny the TDS Companies' motion for rehearing, not only because it is the latest in a repetitious series of maneuvers to forestall competition as long as possible, but also because it fails either to introduce any newly discovered evidence to suggest that the Order was wrongly decided, or to offer any new basis for the Commission to conclude that the Order was unlawful.

In this latest motion, the RLEC Representatives fail to meet their burden (1) to introduce new evidence that was unavailable at the original hearing, and/or (2) to identify matters that were "overlooked or mistakenly conceived in the original decision."^{7/} Rather, the motion for rehearing "merely reassert[s] prior arguments and request[s] a different outcome."^{8/} Under the Commission's standards for rehearing, therefore, the motion should be denied.^{9/}

^{7/} *Dumais v. State*, 118 N.H. 309, 311 (1978) (quoting *Lambert Constr. Co. v. State*, 115 N.H. 516, 519 (1975)); see also *Kearsarge Telephone Co., Wilton Tel. Co., Hollis Tel. Co. & Merrimack County Tel. Co., Petition for an Alternate Form of Regulation*, Docket No. DT 07-027, Order Denying Motion for Rehearing, NH PUC Order No. 24,885; at 9 (2008) (hereinafter "Alt. Reg. Rehearing Order") (setting forth same two factors for consideration of motions for rehearing).

^{8/} Alt. Reg. Rehearing Order at 9 (setting forth same two factors for consideration of motions for rehearing) (citing *In re Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001) and *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003)); see also *Freedom Ring Communications, LLC Complaint against Verizon New Hampshire re: Access Charges*, DT 06-067, Order on Motions for Rehearing and Motion to Intervene, Order No. 24,886, at 7 (2008) (same).

^{9/} In the Alt. Reg. Rehearing Order, the Commission elaborated on the purpose of a rehearing motion, explaining that

[i]f [the order for which rehearing was sought] were before the New Hampshire Supreme Court for review, an appellant would have the burden of demonstrating that the order is 'contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable.' *Appeal of Verizon New England, Inc.*, 153 N.H. 50, 56 (2005) (citing RSA 541:13 and *Appeal of Pinetree Power*, 152 N.H. 92, 95, 871 A.2d 78 (2005)). Our factual findings would enjoy a presumption that they are lawful and reasonable. *Id.* The Court would thus scrutinize the order and not disturb factual findings that have support in the evidentiary record. *See id.* at 58. The rehearing process provides us an opportunity to assure that our findings will survive such review.

Alt. Reg. Rehearing Order, at 12 (citations in original).

ARGUMENT

I. The RLEC Representatives' Claims That Comcast Will Not Provide Telephone Services "for the Public" Are Not Supported by The Record Or Relevant to Consideration of Comcast's Application.

In contending that Comcast Phone has failed to establish that it "actually intends to serve the public," the RLEC Representatives argument does not demonstrate any newly developed evidence to call into question the evidence introduced by Comcast Phone, challenge any of this evidence, or assert that the Commission misconstrued any of the evidence Comcast Phone presented. Indeed, the fundamental factual predicate of the Feb. 6th Order was the set of facts describing Comcast Phone's proposed service offerings to which the RLEC Representatives stipulated at a technical session held on June 12, 2008.^{10/} The RLEC Representatives merely repeat the arguments made in briefing, prior to the issuance of the Aug. 18th Order, that the services described in the stipulation, the CLEC-10, and subsequent rate filings are not telephone service "to the public."

The Commission has routinely certified as CLECs a number of companies offering resale service,^{11/} as well as providers of T1 service.^{12/} "[A] distinguishing characteristic of a public utility is service to the public without discrimination."^{13/} It is well-established that the

^{10/} *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Stipulated Facts (June 12, 2008).

^{11/} *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*, Docket No. DT 05-052, Order Nisi Granting Authorization, NH PUC Order No. 24,456, (Apr. 15, 2005) (granting "an application to provide resold . . . local exchange telecommunications services"); *Acceris Communications Corp Petition for Authority to Provide Facilities Based CLEC Services and to Operate as a Re-Seller of Telecommunications Services*, Docket No. DT 04-242, Order Nisi Granting Authorization, NH PUC Order No. 24,446 (Mar. 24, 2005) (same).

^{12/} *See, e.g., North Atlantic Networks, LLC Petition for Authority to Provide Non-Facilities Based Local Telecommunications Services*, Docket No. DT 04-081, Order Nisi Granting Authorization, NH PUC Order No. 24,415 (Dec. 29, 2004) (granting applicant "authority to provide non-switched (private line) service"); *Computer Network Technology Corporation Petition for Authority to Provide Non-Switched Private Line Local Telecommunications Services*, Docket No. DT 03-218, Order Nisi Granting Authorization, NH PUC Order No. 24,305 (Apr. 2, 2004) (same).

^{13/} *Appeal of Paul Zimmerman*, 141 N.H. 605, 609 (N.H. 1997) (internal quotes omitted).

requirement for a common carrier to serve all people indifferently “does not mean that the particular services offered must be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.”^{14/} By setting forth its proposed Business Local Service and Schools and Libraries Network Service in its CLEC-10 form and filing rate sheets for these services, Comcast Phone has made the undertaking to serve all potential users of the services without discrimination.^{15/}

Rather than take on directly the application of *Zimmerman* or dispute any of the evidence before the Commission, the RLEC Representatives focus again on their conjecture that Comcast Phone will not in fact offer the services it is holding out to the public.^{16/} As the Commission has recognized throughout this proceeding, to the extent Comcast Phone does not carry out its undertaking, there may be a time to address such concerns, but that time is not as a threshold issue in granting the authority for the service in the first instance.^{17/} The RLEC Representatives’ claims that Comcast Phone “will not offer bona fide services to the public,” while unsupported by the record before the Commission, still is not relevant to the consideration of Comcast

^{14/} *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

^{15/} In addition, the rate schedule submitted by Comcast Phone in support of its CLEC-10 Application makes clear that the company’s Business Local Service is made available to all qualified interested parties without discrimination and is the same service that is currently offered in Comcast Phone’s rate schedule for most of New Hampshire.

^{16/} *See, e.g.*, Joint Motion, at 3 (the Order “did not require any demonstration through business plans or otherwise that Comcast Phone actually intends to serve the public”); 5 (“[Mr. Kowolenko] offered no evidence that Comcast Phone secured customers for the service it now claims it will offer in the TDS Companies’ service territories”); 6 (asserting that “the sole objective of Comcast Corporation is for its Comcast Phone affiliate to obtain interconnection so that it can provide private carriage of telecommunications to Comcast IP”).

^{17/} *See* Prehearing Tr., at 33, in which Chairman Getz declared that the issues to be decided in this proceeding should be limited to the question whether “Comcast qualif[ies] *in the first instance* and should it be approved, its registration as a CLEC?”, and questions “about what might happen or might not happen in the future” are outside the scope of this proceeding (emphasis added).

Phone's application for authority to enter the market, and thus this argument does not provide a basis to allow the Joint Motion and grant a rehearing.

B. It Was Unnecessary for The Commission to Consider The Legal Status Of Comcast Digital Voice Or Any Other VoIP Service as A Predicate to Certification.

Having already rejected three times the argument that it must consider the regulatory status of VoIP service as part of this certification proceeding, the Commission should not now reconsider its determination that this issue "is beyond the scope of this proceeding"^{18/} on the fourth go-around.^{19/} Even if the RLEC Representatives were correct that a determination the VoIP should be regulated would mean that existing Comcast Digital Voice VoIP services are unlawful telephone service,^{20/} it does not follow that such regulation necessarily must be considered in the context of an application by Comcast Phone for authority to provide lawful regulated services. The Commission was both correct and within its policy-making discretion to separate these matters.

^{18/} Feb. 6th Order, at 19; *see also* Prehearing Tr., at 33 (Chairman Getz concluding that the regulatory status of Comcast's digital voice service "would not be part and parcel to this CLEC application ...[but] would be something we would deal separately from the issue of whether they should be qualified as a CLEC in New Hampshire"); Aug. 18th Order, at 6 (the status of Comcast's digital voice service is not at issue in this proceeding).

^{19/} Perhaps the most remarkable assertion in the Joint Motion is the RLEC Representatives citation, on p. 7, n. 2 of the Joint Motion, to page 6 of the Aug. 18th Order, in which the Commission stated that "[t]he question of whether Comcast IP's new digital voice service is a regulated telephone service is an important regulatory issue." The RLEC Representatives omit the very next sentence of the Aug. 18th Order, in which the Commission made clear that "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" (emphasis added).

^{20/} Comcast's interconnected VoIP service is an information service under FCC precedent. The FCC has generally regulated VoIP "under [its] Title I ancillary jurisdiction to encompass both [information and telecommunications] services," *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, ¶ 54 (2007); and the FCC has preempted efforts to subject a VoIP provider's service to broad regulation as a "telephone service" under state law and thus subject such services to entry, rate and 911 requirements. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"); *aff'd by Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). Pursuant to FCC Title I regulation and its own policies and practices, Comcast provides numerous features such as E911 and consumer and privacy protections as part of its VoIP service. Comcast therefore submits that there is no basis for state regulation of VoIP.

The Commission has soundly and repeatedly rejected the proposition that harm to the public good occurs if an affiliate of Comcast Phone is permitted to offer unregulated VoIP services^{21/} before it is conclusively determined whether offering such services is subject to regulation. Indeed, the Commission acknowledged in the Order that numerous companies – including the TDS Companies themselves – offer unregulated service in New Hampshire, with no harm to the public good. “These competitive offerings,” which include Comcast VoIP service in FairPoint’s service territory, “are consistent with the state and federal policies we are bound to promote and are not unfair to the ILECs.”^{22/}

C. The Commission Did Not Rule Improperly On Any Issues Not Before It.

The RLEC Representatives next claim that, without notice of the stakes in the proceeding, the Commission “ordered the TDS Companies to interconnect with Comcast Phone.” Comcast Phone and the TDS Companies are presently engaged in an interconnection arbitration in which the sole issue is whether Comcast Phone is not a “telecommunications carrier” under applicable law.^{23/} It is in that proceeding the ultimate determination will be made whether Comcast Phone is entitled to interconnection with the TDS Companies. That the TDS Companies are obligated to interconnect with Comcast Phone is certainly a logical conclusion to draw from the major premise that, under 47 U.S.C. § 251 (a)-(c), all telecommunications carriers are obligated to interconnect, and the minor premise of the Commission’s determination in this proceeding that the services proposed in Comcast Phone’s application are telecommunications services. But it is the arbitration proceeding that will make this obvious conclusion binding and

^{21/} Of course, Comcast’s Digital Voice service is only “unregulated” by the State of New Hampshire. As noted in note 20, *supra*, Digital Voice is subject to FCC Title I regulation.

^{22/} *Id.*

^{23/} *Comcast Phone of New Hampshire d/b/a Comcast Digital Phone, Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS Companies*, Docket No. DT 08-162

final. To suggest that the Commission ordered interconnection in this proceeding simply manufactures an issue where there is none.

D. The Commission Did Not Interpret the Law Regarding Barriers to Entry Improperly.

In another effort to manufacture an issue, the RLEC Representatives assert that the Commission overreached in construing Sections 251 and 253 of the Telecommunications Act of 1934 to prohibit barriers to competitive entry by CLECs when Section 253(f) of that Act permits a state to require a CLEC, such as Comcast Phone, “to meet the requirements of Section 214(e)(1) of this title” in areas where the ILEC is a rural telephone company. Section 214(e)(1), in turn, provides that carriers eligible to receive universal service funds must offer such services throughout their service area and advertise the availability of such service.

This language in Section 253(f) is irrelevant and a non-sequitur here. First, while Section 253(f) permits a state to condition approval of CLEC’s request for a grant of authority in an area served by a rural ILEC upon compliance with Section 214(e)(1), nothing in the statute affirmatively obligates a state to do so. Neither the Revised Statutes as amended nor the rules and regulations of the Commission provide for any such obligation. Second, the point disregards the context in which the Commission considered barriers to entry in this case. When this proceeding began, RSA 374:22-f was still in effect, and the Commission recognized that construing this statute to give incumbents a veto over competitive entry would pose preemption issues under Section 253.^{24/} Even after the repeal of RSA 374:22-f, the Commission

^{24/} *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Docket No. DT-08-013, Order *Nisi* Granting Application, NH PUC Order No. 24, 483, at 2 (Apr. 4, 2008) (noting then effective RSA 374:22-f was inconsistent with the prohibition in 47 U.S.C. § 253(a) against states “preventing any entity from providing intrastate or interstate service”); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Memorandum Opinion and Order, 12 FCC Rcd. 15639, 15656-57 (1997) (finding Wyoming statute that permitted rural ILECs to veto CLECs’ applications to serve their areas was preempted by 47 U.S.C. § 253(a)).

appropriately recognized the barrier to entry presented by allowing an incumbent to prolong the entry process more than it already had. The Commission should not enable such barriers to competition by now granting rehearing in a proceeding that already has gone on too long.

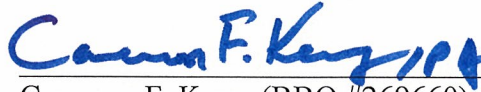
E. The RLEC Representatives' Claims That The Order Violates RSA 374:22-g Have Been Addressed And Rejected Already And Do Not Merit Reconsideration.

In the final section of their Joint Motion, the RLEC Representatives challenge subsidiary findings with respect to certain of the several factors the Commission is permitted to consider in determining whether allowing Comcast Phone's application serves the public good. These arguments do not form any basis for rehearing. Indeed, the RLEC Representatives do not point to a single new fact or legal argument to support their assertion that the Commission erred in its analysis of the evidence and the burden of going forward under the factors set forth in RSA 374:22-g.

CONCLUSION

Enough is enough. The TDS Companies have prolonged their monopoly status by dragging this and other proceedings out with the same arguments the Commission has properly determined are without merit several times already. New Hampshire consumers in the TDS territory have been denied competitive choice for too long. The Commission should swiftly end the RLEC Representatives' efforts to prolong this proceeding by denying without delay the joint motion for rehearing and/or reconsideration of the order.

Respectfully submitted,



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