STATE OF NEW HAMPSHIRE
SUPREME COURT

DOCKET NO. 2009-0168 (consolidated)

Appeal of
Union Telephone Company d/b/a Union Communications

REPLY BRIEF OF PETITIONER-APPELLANT

Attorney Martin C. Rothfelder
N. H. Attorney No. 2880
Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, NJ 07090
Phone: (908) 301-1211
e-mail: mrothfelder@rothfelderstern.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

PUBLIC UTILITIES COMMISSION CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

The PUC has committed errors of law in authorizing MetroCast and IDT to operate as telephone utilities which justify reversal of the matters appealed.

I. This Appeal Involves Solely Legal Issues Which Require *De Novo* Determination Of Whether There Are Errors Of Law.

This appeal involves the issue of whether a hearing and related procedural steps are legally required prior to the Public Utilities Commission ("PUC") authorizing a competitive telecommunications utility to operate. Thus, the inquiry involves solely determining whether there was one or more "errors of law" under RSA 541:13. The cases cited by MetroCast and the Attorney General that involve deference to the PUC in considering evidence and making policy decisions do not apply because the appeal involves only legal requirements and does not involve these other elements of PUC decision-making. MetroCast Brief, p. 6; Attorney General Brief, pp. 4, 10.

MetroCast's citation of authority supporting deference to the PUC in construing ambiguous statutes also does not apply, for there is no ambiguity. The only ambiguity MetroCast claims is that the newer statute, RSA 374:22-g uses the word "authorization", while the older statute, RSA 374:26, uses the language "permission". MetroCast Brief, p. 11. These different words do not create ambiguity. Both wordings synonymously address the act of the PUC to provide the legal right to operate as a utility. This Court has read these statutes in this manner. *See Appeal of Public Service Company of New Hampshire*, 141 N.H.13, 24-25 (1996). Thus, there is no ambiguity.

The Attorney General's brief argues that the PUC order be provided a "presumption of validity", citing *Greenland Conservation Comm. v. New Hampshire*

Wetlands Council, 154 N.H. 529, 544-45 (2006). That case holds that *de novo* review under RSA 541:13 applies to review of issues of law and supports applying *de novo* review to this case, as addressed in the Union Initial Brief. Union Initial Brief, pp.14-15. Thus, *de novo* review applies.

II. The Silence Of RSA 374:22-g On The Issue Of A Hearing Does Not Override The Requirement For A Hearing In RSA 374:26.

MetroCast claims that the silence on the matter of a hearing in the more recent statute, RSA 374:22-g, overrides the hearing language in other statutes. It supports this claim by asserting that if the legislature had intended both RSA 374:22-g and RSA 374:26 to apply "it would have stated so expressly in the text [of RSA 374:22-g]". MetroCast Brief, at 12-13.

MetroCast cites and discusses the case *St Joseph Hospital of Nashua v. Rizzo,* 141 N.H. 9 (1996) and its application of "*expression unius est exclusion alterius* – that the expression of one thing in a statute implies the exclusion of another" in support of this statutory argument. MetroCast Brief, p. 10. In *St. Joseph Hospital*, the hospital sued the spouse of a patient for payment of a bill. The Court looked to the sole applicable statute and found no right for a third party creditor like the hospital to sue where the language did not supply one, in essence finding that the legislature's silence on third party creditors did not provide a right to sue under the statute. *St Joseph Hospital of Nashua v. Rizzo,* 141 N.H. at 11-12. The Court did, however, find a common law right to sue, and thus found that the silence of the statute for third-party creditors did not extinguish this other source of law that provides the right to sue. *Id.*, at 12.

In *St. Joseph Hospital* there were no additional applicable statutes, so the statutory construction argument is distinguishable for the case at hand. Furthermore, in *St. Joseph*

Hospital, the silence of the applicable statute did not override, supersede, or limit the third party's right to sue under the common law, which the Court held was not altered by the statutes silence on third party creditors. *Id*, p. 12. Analogously, St. *Joseph Hospital* supports the Union position that the requirement of a hearing in RSA 374:26 remains unchanged by the legislature's silence on a hearing in RSA 374:22-g.

III. History Of Hearings Under RSA 374:22-G Does Not Change The Rules Of Statutory Construction And Shows A History Of Providing Opportunity For Hearing.

The MetroCast Brief claims the PUC has not held hearings or handled telecommunications applications as contested or adjudicative matters since 2005 in non-rural territories (MetroCast brief, p. 8.) or in Fairpoint territory (MetroCast Brief, p. 10). *See also* MetroCast Brief, p. 13. The statute MetroCast relies on, RSA 374:22-g, has been in place since 1995 and has applied within the territory of the largest incumbent local exchange telephone company ("ILEC") in the state since that time.

Assuming that for three or four of the thirteen years of that statute the PUC has handled these matters as MetroCast claims, it does not alter the rules of statutory construction that determine whether a hearing is required. In addition, if the PUC's administration of the statute is relevant, for years the PUC provided notice and an explicit opportunity to request a hearing in petitions for authority that were governed by RSA 374:22-g. For about ten years it took such action via issuing orders "*nisi*" under which an entity was provided authority only after notice of the application was published in newspapers to notify interested parties and only after the time periods provided in the

notice for parties to request a hearing or provide comments had expired.[1] Thus, for many years the PUC provided opportunity for hearing under the same statutes at issue here.

The recent change by the PUC has not been applied in Union's service territory until the MetroCast and IDT matters. The recent changes provide no assistance in construing the statutes, and further show that for most of the history of RSA 374:22-g the PUC provided an opportunity for hearing on the statutory criteria. Thus, what Union requested at the PUC and is requesting is consistent with what the PUC has provided in the past.

IV. There Is No Federal Preemption.

As noted above, the PUC provided notice and opportunity for hearing for many years prior to providing effective approval of competitive telecommunications authority under RSA 374:22-g. The federal statute addressing barriers to entry, 47 U.S.C. §253, has been in place since 1996. As noted in Union's Initial brief, 47 U.S.C. §253(b) explicitly allows certain state regulatory activity, which encompasses the statutory criteria a hearing would address. Union Initial Brief, pp. 25-26.

As discussed above, the PUC provided opportunities for hearing in the telecommunication utility authorization proceedings for many years without being concerned about federal preemption or being challenged in the Courts or at the Federal Communications Commission ("FCC") on those grounds. No party has found any proceeding where the FCC or a Court ruled that a state or local regulatory authority was

---

[1] *See e.g. France Telecom Corporate Solution, LLC*, Order *Nisi* Granting Authorization (April 7, 2005)(Reply Brief App., p. 1); *TransNational Communications International, Inc.*, Order *Nisi* Granting Authorization (October 8, 2004))(Reply Brief App., p. 7); *Access Point, Inc.*, Order *Nisi* Granting Authorization (July 24, 2000))(Reply Brief App., p. 13); and *Re: National Accounts, Inc.*, Order (February 21, 1996))(Reply Brief App., p. 19).

preempted from holding a hearing regarding entry of a competitive utility. Thus, for these reasons and those in the Union Initial Brief, there simply is no basis to find federal preemption of the hearing requirement.

V. The PUC Rules Were Not Impacted by Legislative Change and Should Be Followed.

MetroCast argues that the legislative change involving the removal of RSA 374:22-f from the New Hampshire statutes authorizes the PUC to ignore the requirements of its existing N.H. Admin. Rule 431.01 and act on a case-by-case basis pending revising its rules. MetroCast Brief, p. 16. N.H. Admin. Rule 431.01 applies to service territories of "non-exempt" ILECs, under the definitions in the PUC's rules, which does not include Union. *See* Union Initial Brief, p. 28. This distinction is based solely upon Federal law and it is not based upon the legislative change which removed RSA 374:22-f , a provision that provided for different treatment of ILECs with 25,000 or less access lines. *Id.* Thus, the argument that the PUC may overlook or ignore the requirements of its rules or otherwise improvise due to the legislation is not supported by the language of the legislative change.

VI. Findings Of Fact Are Required.

MetroCast argues that findings are not required under RSA 374:22-g and RSA 363:17-b. MetroCast Brief, pp. 10, 14. These arguments overlook the basic requirement that administrative agencies must provide findings of fact on the relevant matters in order for there to be appellate review of whether such decisions are reasonable. *New England Telephone & Telegraph Co. v. State*, 95 N.H. 353, 359 (1945). Without such findings, "the courts cannot determine whether a given action is or is not arbitrary." *Id.* Thus,

there is no basis to conclude that findings are not required as a basis for the PUC's actions.

VII. Constitutional Rights Of Union Are Involved.

While the statutory violations constitute sufficient basis for reversal of the PUC action, the constitutional rights of Union are involved. Union is not only a utility, but is obligated to provide service as the carrier of last resort. MetroCast Appeal App. at 54. Its rates, terms and conditions of service are actively regulated by the PUC. *See e.g.* RSA 378:1 through 3, RSA 378:4 through 7, *In re Union Telephone Co.*, 92 N.H.P.U.C. 164 (2007). Such regulation involves constitutional protections. *See e.g. Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989) (Court holds, in rate case, that the use of utility property without paying just compensation violates the Fifth and Fourteenth Amendments to the U.S. Constitution.); *New England Telephone and Telegraph*, 113 N.H. 92, 96 (1973) (Court holds, in rate case, that PUC's orders "must conform to well established constitutional requirements" both at the time of the order and "for a reasonable time thereafter".)

MetroCast argues that the state law must create the constitutional right. MetroCast Brief, p. 18. Whether or not that is accurate, RSA 374:22-g specifically addresses the constitutional right of the incumbent utility addressed above by requiring the PUC to consider the "incumbent utility's opportunity to realize a reasonable return on its investment". Thus, this constitutional right is in the statutory factors the Commission is required to address by RSA 374:22-g. Thus, this appeal involves both statutory and constitutional rights of Union.

VIII. Union Has Standing To Appeal The PUCs Action.

MetroCast erroneously claims that Union lacks standing to appeal this matter, raising concerns that it was not formally designated as a party below and of the lack of sufficient showing of harm. MetroCast Brief, pp 18-20. *See also* Attorney General's Brief, p. 10. These arguments lack merit.

One need not be designated a party below to file an appeal. RSA 541:3 allows "any person affected by an action" to file a motion for rehearing and, upon denial of such motion, an "applicant" for rehearing may file an appeal under RSA 541:6. The statutes clearly allow any person who was denied rehearing to file an appeal and does not restrict this to persons designated as parties below.

Union filed motions for rehearing in both the IDT and MetroCast PUC proceedings, which were denied. The denial was not based upon Union being unaffected by the PUC action. Union timely filed for appeal. Thus, the criteria raised by the statutory language for filing an appeal are met.

MetroCast cites *Appeal of Robert C. Richards et. al; Appeal of Campaign for Ratepayer Rights v. Hilberg*, 134 N.H. 148 (1991), regarding the requirement that Union must also show harm to have standing to appeal the Orders on Rehearing. MetroCast Brief , p. 19. That case holds that:

> After an administrative agency has denied an individual's motion for rehearing filed pursuant to RSA 541:3, in order to have standing to appeal the agency's decision to this court, he must demonstrate that his rights may be directly affected by the decision, *see* RSA 541:3 and : 6, or in other words, that he has suffered or will suffer an injury in fact.

(Citations and quotation marks deleted.) *Id.,* at p.154.

Consideration of an Union's ability to meet its obligations as the carrier of last resort and to earn a reasonable return are substantive legal issues, among other factors, that the statutes require the PUC to address through the hearing procedures. RSA 374:22-g requires the review of these matters at the time of issuance of competitors' authority. PUC has denied Union an opportunity for any type of proceeding or receipt of evidence or other information to review these statutory matters involving its rights. Thus, Union was harmed and its rights were directly affected.[2]

CONCLUSION

The PUC committed errors of law that directly impacted on Union, justifying reversal of the PUC actions appealed herein.

Respectfully submitted,

UNION TELEPHONE COMPANY d/b/a UNION COMMUNICATIONS
By its Attorneys
Rothfelder Stern, L. L. C.
625 Central Avenue
Westfield, NJ 07090

Date: 12/21/09

By: Martin C. Rothfelder
Martin C. Rothfelder (NH Bar. No. 2880)

---

[2] MetroCast also argues that competition is insufficient to have standing to appeal, citing *Nautilus of Exeter, Inc v. Town of Exeter and Exeter Hosp.*, 139 N.H. 450 (1995). MetroCast Brief, p. 19. MetroCast's reliance on this land use case is misplaced, as that case involves a zoning mater where the Court found appellant's property too far away to be impacted by the land use issues in the case. In contrast, this Court held that increased competition is a sufficient basis to have standing to appeal. *New Hampshire Bankers Association v. Nelson*, 113 N.H. 127, 129 (1973).