

October 27, 2008

VIA EMAIL AND OVERNIGHT DELIVERY

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301



**Re: MetroCast Cablevision of New Hampshire, LLC Application for Certification
Amendment - Undocketed**

Dear Ms. Howland:

I am writing on behalf of Comcast Phone of New Hampshire, LLC (“Comcast Phone”) regarding the Application for Certification Amendment filed by MetroCast Cablevision of New Hampshire, LLC (“MetroCast”) granted by the Public Utilities Commission on September 30, 2008.

Comcast Phone desires to reserve its procedural rights with respect to this proceeding and to correct misinterpretations of applicable statutes and Commission rules expressed in the opposition to the MetroCast application filed by Union Telephone Company and the related letter filed by the New Hampshire Telephone Association (“NHTA”). Because these same statutes and regulations are also at issue in Comcast Phone’s application for CLEC authority currently pending before the Commission,¹ Comcast Phone has an interest in ensuring they are interpreted correctly.

Union Telephone and the NHTA propose to stand RSA 474:22-g – as recently amended by the Legislature and interpreted by this Commission – on its head. Their interpretation would erect barriers to entry for all competitive telecommunications carriers in the form of lengthy hearings and difficult-to-prove evidentiary findings in the control of incumbents. This would alter the entry procedures this Commission has applied routinely under Puc 431.01-02 and undermine “the policy of the state of New Hampshire to encourage competition for all telecommunications services, including local exchange services, which will promote lower prices, better service, and broader consumer choice for the residents of New Hampshire.”²

¹ *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013.

² 1995 N.H. Laws 147:1.

The repeal of RSA 474:22-f and simultaneous amendment of RSA 474:22-g “makes it clear the legislature intends to allow competition in all areas of the state.”³ By repealing RSA 474:22-f, the Legislature eliminated the category of “exempt” telephone companies that have fewer than 25,000 lines with different statutory language governing competitive entry. In turn, the Legislature amended RSA 474:22-g by merely deleting the references to RSA 474:22-g and to companies with fewer than 25,000 lines. To the substantive standards that would apply to all entry, the Legislature made no changes whatsoever. See Attachment A.

The NHTA is therefore wrong to suggest that the amended statute “contemplates the possibility of a rulemaking process as it relates to small rural companies.”⁴ On the contrary, as a result of the amendment and repeal, the procedures and standards that apply to Metrocast’s application (and to Comcast Phone’s) are the same as those that have applied to any other CLEC under Puc 431.01-02. The Commission recently explained that when it “adopted N.H. Code Admin. Rules Puc 431.01, it considered the interests of competition with other [public good] factors . . . [expressed in] RSA 374:22-g” and that the “current CLEC registration rules provide an appropriate balance between the interests of incumbent telecommunications providers and those of competitive entrants.”⁵ The CLEC registration procedure in Puc 431.01-2 that the Commission has employed for many years to approve the entry of many New Hampshire CLECs appropriately employs a streamlined process that requires only that the applicant provide on a CLEC-10 application the basic information necessary for the Commission to conduct its analysis of the public good, as Metrocast did in this instance. There is no basis to adopt different and more restrictive procedures. If the NHTA were correct that the language in RSA 474:22-g concerning “public good” findings requires hearings for CLECs entering the territory of rural ILECs, this interpretation would require such hearings for *all* entry since the statute now makes no distinction between the territory of rural ILECs and other ILECs. Such a requirement would radically alter the balance the Commission has struck.

The same applies to Union Telephone’s contention that hearings are required by RSA 374:26. Under standard rules of statutory construction, the more specific authorization provisions of RSA 374:22-g, which do not require a hearing as applied by the Commission, take precedent over the general provisions of RSA 374:26.⁶ Had the Legislature intended that the

³ *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, DT 08-013, Order No. 24,887, Order Granting Hearing, p. 8 (Aug. 18, 2008) (“Hearing Order”).

⁴ Letter from Frederick J. Coolbroth, Counsel for the New Hampshire Telephone Association, to Debra A. Howland, Executive Director and Secretary, New Hampshire Public Utilities Commission (Oct. 21, 2008).

⁵ Hearing Order at 7.

⁶ See Letter from Nancy J. Smith, Assistant Attorney General, Civil Bureau, to Elizabeth M. Twomey and Stanley R. Arnold, Commissioners, Department of Education (New Hampshire Op. Att’y Gen., Nov. 25, 1997) (“Statutory construction requires that specific statutes control over statutes of general applicability.”); *State v. Farrow*, 667 A.2d 1029, 1032 (N.H. 1995) (“where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the latter will be regarded as an exception to the general enactment where the two conflict.”); *State v. Bell*, 480 A.2d 906, 911 (N.H. 1984) (same).

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Commission adopt new or different rules to apply to competitive entry in the territory of rural ILECs or of all ILECs, it could have done so by including in the amendment to RSA 374:22-g a hearing provision in or a reference to RSA 374:26. That it did not do so ratifies the balance the Commission struck in the pre-existing standards and procedures of Puc 431.01-02.⁷

Union Telephone's argument that Puc 431.01 is not applicable to CLEC applications in the territory of rural ILECs because the rule contains language limiting its application to "the territory of non-exempt ILECs" is specious in light of the Legislature's action.⁸ With the repeal of RSA 474:22-f, there is no longer any distinction between an "exempt" and "non-exempt" ILEC. The fact that the Commission has not yet undertaken a ministerial amendment to delete this obsolete wording in its rules does not alter the legislative intent that there be one single procedure applying to CLEC registration in the territory of all ILECs.

The Legislature has long recognized that New Hampshire citizens benefit from competition in provision of telecommunications services and the Commission has implemented that pro-competitive public policy through the use of uncomplicated and consistent procedures that allow the entry of competitive carriers while protecting the public good. Union Telephone and the NHTA are wrong to urge the Commission to abandon these well established pro-competitive procedures in favor of restrictive procedures, including expensive and time-consuming evidentiary hearings that serve only to erect barriers to entry and maintain local monopolies in the provision of telecommunications.

Respectfully submitted,

Cameron F. Kerry
Cameron F. Kerry by Ernest Cooper

cc: Kathryn Bailey
Meredith A. Hatfield
Robert J. Munnely
Martin C. Rothfelder
Frederick J. Coolbroth
Stacey L. Parker

⁷ The fact that the Commission ordered a hearing based on RSA 374:26 in the current proceeding involving Comcast Phone, Hearing Order at 7, is not to the contrary. At the time the Commission ordered that hearing, the Legislative repeal of RSA 374:22-f had not yet taken effect, so the question of application of the more specific streamlined procedures provided by RSA 374:22-g was still at issue in that case at the time the hearing was ordered.

⁸ *MetroCast Cablevision of New Hampshire, LLC Application for Certification Amendment*, Undocketed, Motion of Union Telephone Company to Rescind Authority Issuance, for Procedures Consistent with Law, and for Rehearing, at 7 (filed Oct. 10, 2008).

ATTACHMENT A

SB 386 – AS AMENDED BY THE HOUSE

30Apr2008... 1375h

2008 SESSION

08-2677

06/01

SENATE BILL **386**

FACT relative to service territories served by several telephone utilities.

SPONSORS: Sen. Gottesman, Dist 12; Rep. Levesque, Hills 5; Rep. Spratt, Hills 3

COMMITTEE: Energy, Environment and Economic Development

AMENDED ANALYSIS

This bill deletes the distinction between certain telephone utilities with more than 25,000 access lines and those with fewer than 25,000 access lines.

Explanation: Matter added to current law appears in *bold italics*.

Matter removed from current law appears [~~in brackets and struck through~~].

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

30Apr2008... 1375h

08-2677

06/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eight

FACT relative to service territories served by several telephone utilities.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Service Territories Served by Certain Telephone Utilities. Amend RSA 374:22-g to read as follows:

374:22-g Service Territories Served by Certain Telephone Utilities [~~With More Than 25,000 Access Lines~~].

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 [~~and that has more than 25,000 access lines~~], 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.

III. The commission shall adopt rules, pursuant to RSA 541-A, relative to the enforcement of this section [~~and RSA 374:22-f~~].

2 Repeal. RSA 374:22-f, relative to service territories served by several telephone utilities with fewer than 25,000 access lines, is repealed.

3 Effective Date. This act shall take effect 60 days after its passage.