STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NOS. 2009-0168 & 2009-0432 (CONSOLIDATED)

APPEAL OF
UNION TELEPHONE COMPANY d/b/a UNION COMMUNICATIONS

SUPPLEMENTAL MEMORANDUM
OF METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

Introduction and Summary of Argument

Appellee MetroCast Cablevision of New Hampshire, LLC ("MetroCast") responds to the Court's March 3, 2010 order ("Order") requesting supplemental memoranda with respect to constitutional claims advanced by Appellant Union Telephone Company ("Union").[1] The Order recites the three due process balancing factors originating in Mathews v. Eldridge, 424 U.S. 319, 335 (1976):

> ... (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[2]

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[1] See New Hampshire Const., Part I, art. 15 (providing that no one shall be "arrested, imprisoned, despoiled, or deprived of his proper, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land...."); see also U.S. Const., arts. V and XIV (applying federal due process requirements to the states).

[2] Order at 1 (internal citations omitted).

The Order then directs MetroCast, Union and Appellee Public Utilities Commission ("Commission" or "PUC") to furnish memoranda that address the following question and any fairly comprised subsidiary questions:

> If we accept Union's assertion that its right to realize a reasonable return on its investment is entitled to constitutional protection, do the PUC's current procedures for authorizing more than one provider to provide telecommunications services in any service territory comport with due process, considering [the second and third Mathews factors].[3]

Union's claims for an adjudicatory hearing under constitutional due process provisions should be rejected. Any due process right would originate from text in RSA 374:22-g directing the Commission to consider, inter alia, an incumbent local exchange carrier's ("ILEC's") opportunity to earn a reasonable return in determining whether to grant a request for competitive entry.[4] As a threshold matter, the Commission's orders denying Union's requests for rehearing of the MetroCast and IDT America Corp. ("IDT") entry certifications state that the Commission considered each of the RSA 374:22-g factors when approving a non-adjudicative process, albeit without an adjudicative hearing or formal written findings.[5] Even if the Commission's stated confirmation that it had considered the incumbent's return, among other factors, is disregarded and a constitutional property interest is assumed, the second and third elements of the Mathews

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[3] Id. at 2.

[4] Order at 1; see RSA 374:22-g (providing in pertinent part that "In determining the public good, the commission shall consider . . . the incumbent utility's opportunity to realize a reasonable return on its investment....").

[5] See Appendix to Union Initial Brief, pp. 49-50 (hereinafter "A.49-50"). Order No. 24,939, Order Denying Motion to Rescind Authority and Motion for Rehearing (Feb. 6, 2009) (hereinafter "MetroCast Order") at 8-9); A.59 (Order No. 24,970, Order Denying Motion to Rescind Authority and Motion for Rehearing (May 22, 2009) (hereinafter "IDT Order") at 6).

balancing test contradict Union's claim of a constitutional right to an adjudicative hearing on all competitive entry requests for the following reasons.

First, an adjudicative hearing is unnecessary to avoid an erroneous deprivation of Union's rights. Union could have or did (1) utilize rehearing procedures to challenge the basis of certification requests and/or seek an adjudicative hearing prior to a Commission decision; (2) address particularized ILEC concerns during interconnection negotiations, arbitrations and proceedings; (3) pursue appellate or other judicial relief; and (4) petition for alternative regulation treatment. See Section I infra. [Pp. 3 to 6].

Second, the State's interests in fostering competition, complying with federal and state law entry barrier prohibitions and avoiding resource-intensive adjudicative procedures regarding entry requests in each of New Hampshire's many rural telephone territories significantly exceeds Union's minimal interest in a pre-certification adjudicative hearing process. See Section II infra. [Pp. 7 to 12].

Argument

I. The Commission's Nonadjudicative Process for New Entrants Presents No Risk of an Erroneous Deprivation of Property Interests.

A. Union Had Meaningful Opportunities to Raise Concerns Regarding Adverse Impacts of Competitive Entry.

Even if it is assumed that Union has an interest in realizing a reasonable return on its investment that merits constitutional protection through an adjudicative hearing requirement, a conclusion with which MetroCast would strongly disagree,[6] the procedural protections to Union under applicable law far exceed due process requirements.[7] Union

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[6] MetroCast Brief at pp. 17-18.

[7] See Riblet Tramway Co., Inc. v. Stickney, 129 N.H. 140, 148 (1987) (noting that "fundamental fairness" is required to comport with due process). Procedural due process requires "'an opportunity . . .

had multiple opportunities to present the merits of its concerns to the Commission or the courts in a "meaningful" time and manner, precluding a due process violation.[8]

First, Union used the Commission's rehearing procedures under PUC 203.33 and RSA 541:3 to challenge the Commission's nonadjudicative authorizations to MetroCast and IDT. Union also had every opportunity to use the rehearing process to make factual arguments, supported by affidavit testimony or offers of proof, explaining its opposition to certification under RSA 374:22-g.[9] Union does not need access to formal discovery tools to present its claims to the Commission in a meaningful fashion. Union has access to its own revenue and cost information, and substantial information on the particular competitive provider will be publicly available in its application, websites and telecommunications dockets in New Hampshire and elsewhere.[10]

Second, in order to serve customers in the Union territory, MetroCast and IDT first needed an interconnection agreement with Union detailing the rates, terms and conditions for the mutual exchange of telecommunications traffic pursuant to federal law.[11] IDT's October 2008 request to commence interconnection talks on behalf of IDT and MetroCast and the ensuing 47 U.S.C. § 252(a) negotiation process gave Union notice of the intended competitive entry and an opportunity to take action, in connection with

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granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (citations omitted; emphasis in original).

8 See Logan, 455 U.S. at 437.

9 See Riblet, 129 N.H. at 150 (determining that risk of erroneous deprivation was reduced where plaintiff had an opportunity to present its side informally prior to its property loss).

10 See A.77 (PUC 431.02-19 (CLEC-specific information in the application)).

11 See generally 47 U.S.C. § 252 (establishing negotiation and litigation procedure for interconnection arrangements).

the certification process (as discussed above) or in seeking contract provisions through a negotiation or arbitration pursuant to 47 U.S.C. § 252(b) that reflected Union's interests as an ILEC.[12]

Third, Union availed itself of state statutory rights to appeal its adverse Commission rulings.[13] Union presented its due process arguments to the Commission and had the opportunity to present factual arguments regarding the impact of competitive entry on Union's ability to earn a reasonable rate of return, both issues being appealable to this Court. Union also could have sought other available avenues for judicial intervention or review, such as injunctive or declaratory relief.

Finally, Union at all times retains the ability to seek relief from the Commission under an alternative regulation scheme.[14] Such plan could be developed pre- or post-entry and, if the latter, could focus on actual adverse impacts on the ILEC's business as compared to seeking to deny entry entirely through claims of speculative harms.

B. Additional or Substitute Procedures Would Have No Value in Safeguarding Union's Rights.

In light of the numerous available opportunities for Union to present claims of adverse impacts or seek prospective regulatory relief, the second Mathews factor does not

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[12] See Appendix to MetroCast Brief, pp. 59-88 (hereinafter "A-MetroCast Br. 59-88") (DT 09-048, IDT America, Corp. Petition for Arbitration of an Interconnection Agreement with Union). In addition, while MetroCast and IDT did not seek access to Union's facilities on an unbundled basis, any competitive provider that sought such access from Union or another rural carrier in the future pursuant to 47 U.S.C. § 251(c) would first have to request access and, if declined, would be required to request a Commission unbundling proceeding pursuant to 47 U.S.C. § 251(f). In such a case, Union would have a full opportunity to present factual testimony regarding the impacts of unbundling on its business before the competitive provider could commence entry.

[13] See Riblet, 129 N.H. at 150 (establishing that even the opportunity of a hearing after a property taking reduces the risk of a permanent deprivation of property without a hearing).

[14] See RSA 374:3-a and PUC Rule 206 (establishing requirements for approval of an alternative regulation plan).

require any expanded or substitute procedures.[15] To the extent additional procedures would have any value, such value would be outweighed by the associated costs.[16]

Specifically, the Commission approved the MetroCast and IDT competitive entry requests using a streamlined application process that it has employed since 2005 without challenge in the Verizon/FairPoint territories.[17] In so doing, the Commission considered the factors enumerated in RSA 374:22-g.[18] As discussed in Section I.A above, both pre- and post-competitive entry, Union retains the ability to make a case for special rulings to ensure a reasonable return on investment using any or all of several available procedural vehicles or through a petition for alternative rate treatment. Given the protections, no additional procedures are necessary to afford due process.

Requiring an adjudicative hearing would destroy the efficacy of a streamlined process for competitive entry into New Hampshire's rural territories without clear offsetting benefits. Union and other rural incumbents have the rehearing process to present any relevant facts about expected adverse impacts on their regulated rates of return from competitive entry. A full hearing, akin to a rate case, potentially would take many months and cost tens or hundreds of thousands of dollars in legal fees. Even then, the most useful data – a competitor's success in taking market share from the rural incumbent – is not known or knowable as it will depend on the competitive marketplace.

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15 Mathews, 424 U.S. at 355.

16 Id. (establishing third Mathews factor).

17 See A.77 (PUC 431.01 (establishing nonadjudicative process); PUC 431.02-19 (requesting other CLEC information in application)).

18 See A.49-50 (MetroCast Order at 8-9); A.59 (IDT Order at 6); see also A.8-9 (2008 N.H. Ch. 350 (retaining rulemaking requirement relative to enforcement of RSA 374:22-g as amended to implement the statutory changes)).

II. The Commission's Interest in a Streamlined Licensing Process Outweighs Union's Interest in a Full Adjudicative Hearing.

A. Strong Governmental Interests Support the Commission's Denial of an Adjudicative Hearing for Union.

Substantial governmental interests support the nonadjudicative licensing approach applied by the Commission to the MetroCast and IDT entry requests. These factors weigh against an adjudicative hearing requirement for Union.

1. Interest in Fostering Competition.

Without a streamlined certification process, the Commission will be unable to foster telecommunications competition in New Hampshire's rural territories.[19] The 2008 statutory changes that eliminated more restrictive entry requirements for rural ILEC territories made clear that rural carriers would be subject to the same RSA 374:22-g standards that were interpreted to provide for a nonadjudicative entry process for Verizon/FairPoint territories since 2005. The Commission has expressed its concern that extensive entry procedures will frustrate the development of competitive alternatives in New Hampshire's many rural areas.[20] The Court should hesitate to gainsay this concern of the expert agency.[21]

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[19] See A. MetroCast Br. 1 (1995 N.H. Ch. 147 (New Hampshire policy is "to encourage competition for all..."); RSA 374:22-g (requiring Commission to consider "the interests of competition. . . .")).

[20] See A.48 (MetroCast Order at 7); A.57 (IDT Order at 5); see also Section II.B infra.

[21] See Appeal of the Office of the Consumer Advocate, 148 N.H. 134, 136 (2002) (providing that when "reviewing agency orders that seek to balance competing economic interests, our responsibility is not to supplant the PUC's balance of interests with one more nearly to our liking.... We give the PUC's policy choices considerable deference") (internal citations omitted); Appeal of Pinetree Power, Inc. & a., 152 N.H. 92, 96 (2004) (requiring "substantial deference" to interpretations of agencies charged with interpreting ambiguous text in statutes they administer).

2. Avoidance of a Preempted Entry Barrier.

The Commission also has expressed its concern that granting an adjudicative hearing on entry requests into rural territories will serve as an entry barrier subject to preemption pursuant to 47 U.S.C. § 253 or RSA 374:22-g itself.[22]

With respect to federal law, the Communications Act, as amended by the Telecommunications Act of 1996,[23] was enacted ". . . to remove regulatory barriers and encourage competition among telecommunications providers."[24] The '96 Act expressly limited the power of states, and eliminated state and municipal barriers to telecommunications competition. Section 253(a) of Title 47 provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,"[25] thereby ensuring "that state and local regulations do not serve as barriers to entry into the telecommunications market. . . ."[26] The Commission has made clear that construing RSA 374:22-g to allow Union a right to an adjudicative proceeding on competitive entry requests in areas served by Union would be inconsistent with the language and policy of the '96 Act.[27] In enacting Section 253,

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22 See A.48 (MetroCast Order at 7); A.57 (IDT Order at 5); see also Section II.B infra.

23 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereinafter the "'96 Act").

24 Cablevision of Boston, Inc. v. Pub. Improvement Comm. of Boston, 184 F.3d 88, 93 (1st Cir. 1999).

25 47 U.S.C. § 253(a).

26 Cablevision, 184 F.3d at 97.

27 See A.48 (MetroCast Order at 7); see also 47 U.S.C. § 253(d) (preempting violation of federal competition law).

> Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. *Section 253(a)* takes that choice away from them, thus preventing state and local governments from standing in the way of Congress's new free market vision.[28]

The Commission has recognized that the nonadjudicative process it developed via rulemaking in the Verizon/FairPoint area, and chose to apply to Union following the 2008 statutory changes pending completion of a rulemaking proceeding, fully comports with the terms and goals of the '96 Act.[29] Union's claim of a due process constitutional right to a full adjudicative hearing on competitive entry requests has not been adopted anywhere in the United States and essentially seeks to circumvent nearly 15 years of national pro-competitive telecommunications policy.[30] The Court should affirm as valid the Commission's compelling concern that a full adjudicative hearing to address an incumbent's regulated return, prior to approving competitive entry into a rural territory, will amount to a federally prohibited entry barrier.

The instant due process analysis also should account for the potential for state law preemption. As found by the Commission in its two orders affirming the certifications of MetroCast and IDT, and as discussed in MetroCast's Brief, under RSA 374:22-g "notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility ... shall be nonexclusive."[31] The Court should hesitate to infer a constitutionally required adjudicative hearing from a portion of RSA 374:22-g

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28 Cablevision, 184 F.3 at 98 (emphasis in original).

29 See generally A.42-51 (MetroCast Order); A.54-61 (IDT Order).

30 Notably, Union has not claimed that the '96 Act or any portions thereof are unconstitutional.

31 RSA 374:22-g (emphasis added).

directing the Commission to consider the impacts of competitive entry upon an incumbent's return on investment when the same statute directs the Commission to consider several other factors while authorizing the Commission to approve service by more than one provider in a territory upon "its own motion" and notwithstanding "any other" contrary provision of law.[32]

3. Fiscal and Administrative Burdens on Commission.

Finally, requiring the Commission to conduct an adjudicative hearing on every competitive entry request into a rural territory would have the potential to impose significant fiscal and administrative burdens on the Commission.[33] On the provider side, the Commission presently has more than 100 competitive carriers certified in New Hampshire.[34] On the rural carrier side, the amicus New Hampshire Telephone Association – which does not include Union – claims nine members.[35] The potential for dozens of new adjudicative proceedings weighs against Union's due process claim under the Mathews balancing.

Moreover, finding a due process right originating in RSA 374:22-g for rural carriers likely would confer the same right to the benefit of FairPoint in the rest of New Hampshire. Following the 2008 amendments, entry into all ILEC territories is governed by RSA 374:22-g. Granting Union a constitutional right to an adjudicative hearing under

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32 See id. (emphasis added).

33 See In re Guardianship of Brittany S., 147 NH 489, 493 (2002) (considering costs associated with the volume of future requests for appointed counsel under similar circumstances in determining that due process does not require appointment of counsel).

34 Information available at:< http://www.puc.nh.gov/Telecom/ClecCustomerContacts.pdf >

35 See NHTA Brief at 1.

RSA 374:22-g would potentially confer the same right upon New Hampshire's non-rural ILECs, with attendant increased adverse impacts on the Commission's resources.

B. Union's Interest is Too Insubstantial to Offset the Government Interest in a Nonadjudicative Certification Process.

As both prongs two and three of the Mathews due process test must be balanced against "the private interest affected by the official action," the Court should conclude that Union's interest in the balancing test is insubstantial at best. It does not exceed the strong countervailing interests of new entrants and the Commission.

Union claims that its property interest derives from RSA 374:22-g.[36] While the statute directs the Commission to consider an incumbent's "opportunity to realize a reasonable return on its investment," among other specified factors,[37] nothing in the statute states or implies that it is intended to create a property interest subject to due process protection. To determine otherwise would open the door for new hearing requirements with respect to the remaining factors as well.[38]

Assuming a property interest exists at all, the weight of such an interest pales in comparison to the nature of rights that this Court has confirmed are substantial and significant in evaluating due process protections.[39] Furthermore, Union is operating in a

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36 See Order at 1.

37 RSA 374:22-g requires that the Commission 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. . . ." (emphasis added).

38 Id.

39 See In re Brown, 126 N.H. 309, 312 (1985) (stating, "[A]s we have recently stated [ ] 'the deprivation of liberty inherent in civil commitment is subject to significant due process requirements'" (internal citations omitted); see also State v. McLellan, 146 N.H. 108, 114 (2001) ("The private interest affected here is the deprivation of liberty. With the exception of the death penalty, life imprisonment

highly regulated industry where regulatory changes that affect its operation are foreseeable and expected, in addition to foreseeable marketplace risks inherent in any commercial venture.[40] With all factors considered, Union's interest in a pre-certification adjudicative hearing is minimal at best. It should not trump the Commission's ability to apply existing non-adjudicative procedures that balance the interests of telecommunications providers, consumers and the government itself.[41]

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without parole is the most severe penalty that may be imposed in this State"); State v. Poulicakos, 131 N.H. 709, 713 (1989) ("[. . .] a defendant in a detention hearing has a substantial interest in remaining free pending trial"); In re Shelby R., 148 N.H. 237, 240 (2002) ("The private interests which may be affected in abuse and neglect proceedings are substantial"). Compare Riblet, 129 N.H. at 149, ("Although this interest is not insubstantial, it is far less weighty than those involved when, for example, a welfare recipient is denied his benefits or an individual's employment is terminated...." (describing the plaintiff's property interest in the completion of a construction contract with the State) (internal citations omitted).

[40] See Riblet, 129 N.H. at 149-150 (determining that less weight is given to the plaintiff's commercial interests where attendant risks are assumed and the possibility of the State terminating the contract was not unforeseen).

[41] See In Re Shelby R., 148 N.H. at 241 (ruling that the government's interest in child abuse and neglect cases is not only in protecting the class of children in question but in "protecting the rights of all parties involved....").

Conclusion

For the reasons discussed herein and in the Briefs, Union lacks a constitutional due process or statutory right to an adjudicative hearing on requests by MetroCast and IDT to enter Union's territory and provide competitive communications services for the first time to local residents and businesses.

Respectfully submitted,

METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC

Date: April 2, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Supplemental Memorandum of MetroCast Cablevision of New Hampshire, LLC will be served upon the following parties on or before Monday, April 5, 2010, by first class mail and electronic mail.

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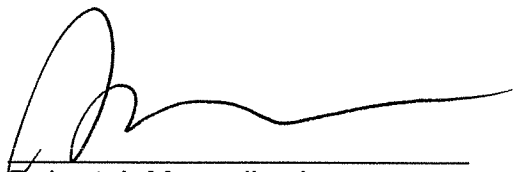

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