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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

July 1, 2010 - 10:11 a.m.
Concord, New Hampshire

NHPUC JUL 21 '10 PM 4:14

RE: DT 09-198
GRANITE STATE TELEPHONE, INC.,
DUNBARTON TELEPHONE CO., BRETTON WOODS
TELEPHONE CO., AND DIXVILLE TELEPHONE
CO. (Rural ILECs): Petition by Certain
Rural Telephone Companies Regarding
CLEC Registration of segTEL, Inc.
(Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Clifton C. Below
Commissioner Amy L. Ignatius

Sandy Deno, Clerk

APPEARANCES: Reptg. Granite State Telephone, Inc.,
Dunbarton Telephone Co., Bretton Woods
Telephone Co., and Dixville Telephone Co.:
Frederick J. Coolbroth, Esq. (Devine...)

Reptg. segTEL, Inc.:
Jeremy Katz
Kath Mullholand

Reptg. PUC Staff:
Matthew J. Fossum, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G

CHAIRMAN GETZ: Okay. Good morning, everyone. We'll open the prehearing conference in Docket DT 09-198. On October 15, 2009, Granite State Telephone Company, Dunbarton Telephone, Bretton Woods and Dixville Telephone Companies filed a petition to rescind or to declare null and void the authorization issued on March 3, 2009 to segTEL, Inc. to provide local exchange service in the rural ILEC telephone exchanges. On May 20, 2010, the New Hampshire Supreme Court issued its opinion in the *Appeal of Union Telephone Company*, which held that RSA 374:22-g and 374:26 require a notice and hearing before granting a CLEC application. The Court remanded the question of whether federal law preempts such a state notice and hearing requirement to us for consideration. On June 11, we issued an order of notice setting the prehearing conference for today.

Can we take appearances before we hear from the parties.

MR. COOLBROTH: Good morning, Mr. Chairman, Commissioners. On behalf of Granite State Telephone, Inc., Dunbarton Telephone Company, Bretton Woods Telephone Company, Inc., and the Dixville Telephone Company, I'm Frederick Coolbroth, of the firm of Devine,

1 Millimet & Branch, in Manchester -- in Concord. With me
2 today is William Stafford from Granite State Telephone.

3 CHAIRMAN GETZ: Good morning.

4 MR. KATZ: Good morning. I'm Jeremy
5 Katz, the CEO of segTEL, and with me is Kath Mullholand.
6 Our General Counsel was unable to make it today, so I'll
7 be representing segTEL.

8 CHAIRMAN GETZ: Good morning.

9 MR. FOSSUM: Good morning. Matthew
10 Fossum, for the Staff of the Commission. And, with me
11 today are Kate Bailey, Michael Ladam, and Jennifer
12 Ducharme from the Commission Staff.

13 CHAIRMAN GETZ: Okay. Good morning.
14 Well, let me just also note for the record that segTEL
15 filed on June 21 a Request for Clarification and/or
16 Modification of the Order of Notice in this proceeding.
17 We will not be modifying the order of notice itself, but
18 we will be correcting the heading for this proceeding on
19 our website and in our docketbook, to make it clear that
20 the petition here applies to the rural ILEC exchanges, and
21 not to all franchise territory or exchanges in the State
22 of New Hampshire.

23 So, with that, Mr. Coolbroth.

24 MR. COOLBROTH: Thank you, Mr. Chairman.

1 This petition was filed seeking a determination that the
2 authorizations granted to segTEL to engage in business as
3 a telephone utility in the service territories of these
4 petitioners was either null and void or, in the
5 alternative, that it should be rescinded. Our argument
6 was that the authorization required first that there be a
7 hearing under RSA 374:26, at which the factors, statutory
8 factors in RSA 374:22-f should be considered. This same
9 issue was the subject of proceedings relating to Union
10 Telephone Company. And, in May, the New Hampshire Supreme
11 Court issued its decision in the *Appeal of the Union*
12 *Telephone Company* case, and upheld substantially the legal
13 position that we have asserted in this case. The Court
14 held that, under the New Hampshire statutory framework,
15 there is a statutory right to a hearing on this issue
16 under 374:26, and that the Commission must consider the
17 factors specified in 374:22-f.

18 The Court remanded that case, with
19 regard to the issue of federal preemption, because a
20 sufficient record with respect to that had not been
21 developed below, and so that issue is remanded in the
22 *Union* proceeding to the Commission.

23 These Petitioners in this case welcome
24 the opportunity to participate in developing such a

1 record. Looking at the Supreme Court's decision, the
2 Supreme Court said that "To determine whether a state law
3 has the effect of prohibiting the provision of
4 telecommunications services, courts and the Federal
5 Communications Commission consider whether the law
6 materially inhibits or limits the ability of any
7 competitor or potential competitor to compete in a fair
8 and balanced legal and regulatory environment." So, it's
9 in this regard that we welcome the opportunity to
10 participate. The principal preemption question relates to
11 Section 253 of the Telecommunications Act, 47 U.S. Code
12 Section 253. Subsection (a) of that section prohibits
13 "State, local, statute or regulation, or other State or
14 local legal requirement, [which] may prohibit or have the
15 effect of prohibiting the ability of any entity to provide
16 any interstate or intrastate telecommunications service."
17 However, that broad prohibition in (a) is subject to
18 limitations elsewhere in the statute, particularly
19 Subsection (b), which says that "Nothing in this section
20 shall affect the ability of a State to impose, on a
21 competitively neutral basis and consistent with
22 Section 254", which I'll get to in a moment, "requirements
23 necessary to preserve and advance universal service,
24 protect the public safety and welfare, [and] ensure the

1 continued quality of telecommunications services, and
2 safeguard the rights of consumers."

3 Looking at Section 254, this section
4 relates to universal service, and spells out universal
5 service principles, which include "quality and rates",
6 "access to advanced services", in particular, includes
7 "access in rural and high cost areas", and spells out a
8 series of factors, and so forth.

9 We contend that the framework under RSA
10 374:22-f and the hearing process in 374:26 can be readily
11 harmonized with that overall statutory framework in the
12 Telecommunications Act, and look forward to developing the
13 record to show how that would be accomplished.

14 CHAIRMAN GETZ: So, your substantive
15 argument then is that the state law is not preempted by
16 federal law?

17 MR. COOLBROTH: That's correct. That's
18 correct.

19 CHAIRMAN GETZ: Are you going to address
20 procedural options that might be available to us or am I
21 jumping the gun?

22 MR. COOLBROTH: Had thought those would
23 be worked on in technical session, but certainly can
24 address it. It seems to me that the first question is

1 really, you know, is "does federal law preempt?" And,
2 "what is the record that one would develop to make that
3 determination?" And, it seems to me that would be
4 briefing. In which the parties would spell out what they
5 think the state process would look like, what would be
6 considered, and why that does not run afoul of 47 U.S.C.
7 Section 253(a). It seems to me that would be briefs to do
8 that.

9 CHAIRMAN GETZ: So, it would be a serial
10 process. That first you would address the preemption
11 question as a matter of law. If there is preemption, then
12 the proceeding might be over.

13 MR. COOLBROTH: Right.

14 CHAIRMAN GETZ: If there is not
15 preemption, then you would go to a fact-based hearing?

16 MR. COOLBROTH: That's correct. And,
17 that structure would determine what that fact-based
18 hearing would consider. So, it seems to me one really
19 would need to take things in that order.

20 CHAIRMAN GETZ: Commissioner Below.

21 CMSR. BELOW: The Court, in their
22 decision, noted that "Because resolving whether federal
23 law preempts such a requirement may entail additional fact
24 finding, we remand this issue to the PUC for resolution in

1 the first instance." I think, you know, in their briefing
2 on this issue, apparently the Court felt that there might
3 need to be some additional fact finding even to make the
4 determination as to whether federal law preempts the
5 statute in question.

6 And, I'm just wondering if you have any
7 thoughts in that regard? Is might we need to do some fact
8 finding, which would suggest something more than just
9 briefing on the issue of preemption, in order to determine
10 the preemption issue?

11 MR. COOLBROTH: Perhaps. There could be
12 disagreement over whether a particular set of procedures,
13 as a factual matter, has the factual effect of preventing
14 entry perhaps, I guess. I'm trying to think of what the
15 factual issues related to -- and, perhaps the segTEL folks
16 could elaborate on that. My thought would be, we would
17 spell out how we think the process would go, in a way
18 that's consistent with both laws, and suggest that to the
19 Commission. It may well be that segTEL may feel that, as
20 a factual matter, that affects their ability to provide
21 telecommunications service, perhaps that would, and if
22 there were disagreements regarding those facts, perhaps
23 that would be -- would give rise to the need for an
24 evidentiary hearing, I guess. I'm thinking this would be

1 resolved on briefs, though.

2 CHAIRMAN GETZ: Okay. Thank you.

3 MR. COOLBROTH: Actually, one other
4 point. In the meantime, we continue to believe that these
5 authorizations for segTEL to operate in these service
6 territories were unlawfully granted. And, we don't know
7 to what extent segTEL has currently engaged in business in
8 these particular territories. But, certainly, with regard
9 to any new business, we don't think that that should
10 happen until this issue has been resolved.

11 CHAIRMAN GETZ: Any opinion on
12 consolidating this proceeding with the 08-130 and 09-065,
13 the Metrocast/IDT America proceedings?

14 MR. COOLBROTH: We don't take a position
15 on that. We understand that the TDS Companies, Union
16 Telephone Company is now one of the TDS Companies, various
17 of those companies have settlement agreements that prevent
18 some of the TDS Companies from contesting certifications
19 by CLECs. The issues for the TDS Companies may be more
20 complicated. They have now retained separate counsel
21 because of those conflicting issues. And, so, how that
22 all fits together, I'm not sure. We're not taking a
23 position. These companies are not taking a position in
24 this proceeding with regard to consolidation. I'm

1 expecting that the Commission may hear more from the TDS
2 Companies at the Union Telephone Company prehearing
3 conference.

4 CHAIRMAN GETZ: But, certainly, there's
5 a common question of law with respect to the preemption
6 argument?

7 MR. COOLBROTH: There is.

8 CHAIRMAN GETZ: All right. Anything
9 further?

10 MR. COOLBROTH: No, Mr. Chairman.

11 CHAIRMAN GETZ: Mr. Katz.

12 MR. KATZ: SegTEL opposes the requested
13 relief. First and foremost, segTEL doesn't believe this
14 is an issue that the four rural telephone companies have
15 with segTEL. This appears to be a general issue, but
16 somehow segTEL's being singled out for different
17 treatment. The rural telephone companies have obligations
18 under both federal and state law to act in a
19 non-discriminatory fashion. And, even a cursory review of
20 authorizations that have been granted in the last year
21 have shown that multiple providers have received
22 authorizations to provide service statewide.

23 I have, on February 4th, Teljet Longhaul
24 applied to provide service in the State of New Hampshire

1 as a CLEC. And, on February 18th, an authorization was
2 signed by Executive Director Howland to Teljet to provide
3 service in the State of New Hampshire without any
4 limitation.

5 For us, we don't believe we should be
6 limited and singled out for special treatment and
7 potentially have our license to provide competitive local
8 exchange service in these territories potentially revoked
9 and investigated, while other CLECs are not complained
10 about and free to continue to build out their networks and
11 provide service.

12 Additionally, if this is going to go
13 forward, we feel that our rights to equal protection under
14 both the federal and state constitutions would be violated
15 as a result.

16 CHAIRMAN GETZ: So, is your position, we
17 should either dismiss the petition as to you or to bring
18 everyone else in?

19 MR. KATZ: I think the petition should
20 be dismissed. And, if the rural telephone companies would
21 like to contest in general all of the CLEC authorizations
22 that have been provided, they should be welcome to
23 resubmit. SegTEL feels like we're being unfairly singled
24 out as a result by this petition, and we can't identify

1 why we would be.

2 Furthermore, we would tend to agree that
3 issue of Section 253, preemption, barrier to entry under
4 the Telecommunications Act, is likely a threshold issue in
5 this case. And, you know, resolution of whether or not
6 these proceedings and hearings requirement would
7 constitute a barrier to entry and would therefore be
8 preempted, is probably worthwhile in being investigated as
9 an early stage issue.

10 Fourth, segTEL believed, and part of
11 this was encompassed in our earlier motion, that the
12 petition is overbroad. First and foremost, only the four
13 Petitioners should be potentially entitled to relief.
14 SegTEL has authority to operate in the TDS operating
15 territories. That authority has not been contested by the
16 TDS Companies, and we have a settlement agreement with TDS
17 that allows us and it agrees that they will not contest
18 our operations in their territories.

19 Furthermore, to the extent that this
20 petition is seeking to limit our ability to do business in
21 these rural territories, it should be limited simply to
22 the provision of competitive local exchange services.
23 Things like information services, data service, interstate
24 service, long distance, competitive toll services, pole

1 attachments, conduit and duct rentals, those things would
2 not be restricted under this petition, and this petition
3 should simply be confined to competitive local exchange
4 service and the services that would be defined under that.
5 We would -- there's not any authority that the rural
6 telephone companies have identified that would allow them
7 to restrict our operations, for instance, as an interstate
8 telephone provider or as a data services provider in their
9 territory.

10 Finally, the four rural LECs, really,
11 they ask for an extraordinary remedy, in that they're
12 asking for an already in effect authorization to be
13 revoked. And, segTEL contends that it complied in all
14 respects with Puc Rule 431 in applying for this authority.
15 We received our authority. We have received -- we've had
16 this authority for over a year now. And, revocation of
17 authority is an extraordinary remedy that is discussed in
18 RSA 374:28 and Puc Rule 431:19. And, the rural LECs have
19 not identified a single cognizable harm that they have
20 endured by virtue of our being authorized for over a year
21 in their territory, and certainly nothing that would rise
22 to the thresholds of requiring an extraordinary remedy,
23 such as CLEC revocation in their territory. And, there's
24 been no wrongdoing on segTEL's part. Thank you.

1 CHAIRMAN GETZ: Okay. Thank you.

2 Mr. Fossum.

3 MR. FOSSUM: Thank you. I guess I'll
4 address things generally, and then to some of the specific
5 points that have been raised.

6 As to what the Commissioners had already
7 raised, obviously, the *Union* remand didn't deal with this
8 case specifically, but it's been noted that there are
9 common issues of law in that case and this. Specifically,
10 determinations of whether registrations of a CLEC in a
11 territory of exempt ILECs requires prior notice and a
12 hearing before being granted. To this point, at least on
13 that issue, Staff's reviewed the Supreme Court's opinion
14 and the order that it contains on remand, but has not yet
15 analyzed fully what the relevant issues may be or become
16 and/or possible resolutions to them. And, we'll be
17 working with the parties to determine whether, in fact,
18 state law is preempted by the federal law, and, if so, to
19 what extent. And, in that process, we'll be looking at,
20 as the Commissioners have noted, whether additional fact
21 finding is necessary and what that fact finding might be.

22 It is possible that the additional fact
23 finding that's required would have to do with what the
24 scope of a possible hearing under state law could be, what

1 it could cover, the timeframes that it could take. And,
2 we would also be interested in discussing with the parties
3 or -- and other interested individuals, whether amendments
4 to the Commission's rules could, in fact, alleviate any
5 conflict.

6 To some of the other issues raised, at
7 least by Chairman Getz, the procedural issue, Staff
8 initially believes that briefs or the filing of testimony
9 would serve as a good gateway to understanding the issues
10 and the points that the parties have raised. But, as for
11 what would happen beyond that, we cannot say exactly. We
12 do, however, support at least consolidation with the
13 Metrocast and IDT cases for resolution of the issue of law
14 that's common to all of them.

15 As to the issues raised by segTEL,
16 obviously, I'm not prepared to address some of them. But,
17 specifically, as to the "extraordinary remedy" portion of
18 things, I don't know that Staff agrees with that point of
19 view, given that the Supreme Court has said that the
20 procedures under Puc Rule 431 are not applicable to
21 petitions of this nature or to authorizations underlying
22 the petition here. Staff, however, has no position on
23 whether the petition is overbroad or that it may
24 potentially violate equal protection, in that it singles

1 out segTEL for any particular treatment.

2 And, that's at least all at this point.

3 Thank you.

4 CHAIRMAN GETZ: Commissioner Ignatius.

5 CMSR. IGNATIUS: Thank you. Mr. Fossum,
6 do you know or is Staff going to undertake a search to see
7 if there are other similarly situated companies in the way
8 that segTEL has raised, that it may be not alone in the
9 situation, and yet identified with a docket onto itself,
10 when others perhaps should be as well?

11 MR. FOSSUM: I think, yes. I think that
12 would be Staff's obligation, to understand whether, in
13 fact, there are similarly situated companies that should
14 be brought in to determine the issue. That said, even if
15 they weren't brought in specifically to this docket, I
16 think that, insofar as a decision may be rendered about
17 the proper procedures to be adhered to in light of the
18 Supreme Court's opinion, whatever decision the Commission
19 renders is going to apply to other entities anyway. And,
20 so, whether they're brought in or not, whatever decision
21 comes out of this case will impact them.

22 CMSR. IGNATIUS: Thank you. Another
23 question, and you may have mentioned it and I just didn't
24 get it. Does Staff have a position today on the

1 regulatory treatment of segTEL during the pendency of this
2 docket? Should it continue as is? Should there be any
3 restrictions on any new business? Should it be a
4 contractual revocation of the existing authority?

5 MR. FOSSUM: No, I mean we -- Staff, to
6 the extent Staff has a position, I don't think we would
7 support revocation of the authorization in whole, if for
8 no other reason than there's certainly been no challenge
9 to segTEL's ability to operate in at least, for example,
10 FairPoint's territory, and to revoke its authorization as
11 a whole may potentially compromise that.

12 I suppose we would support the position
13 of the rural ILECs that the expansion of business during
14 the pendency of this case would not be in the best
15 interests of the resolution of this case and their
16 customers necessarily, because no one can say where this
17 would come out, and it would be unfortunate, I think, to
18 have segTEL expand its business and face possibly having
19 to restrict that business, if the decision of the
20 Commission makes that so. Yes. And, the expansion of
21 which I speak would be in the territory of the petitioning
22 rural ILECs.

23 CMSR. IGNATIUS: All right. Thank you
24 very much.

1 CHAIRMAN GETZ: All right. Mr.
2 Coolbroth, anything further?

3 MR. COOLBROTH: Thank you, Mr. Chairman.
4 It was not the intent of these parties to single out
5 segTEL in a discriminatory manner. One unfortunate effect
6 of the procedure that the Commission was using before was
7 that these companies were provided no notice when these
8 sorts of authorizations were granted. It was by
9 happenstance that the Companies learned about the segTEL
10 authorization over a year ago and brought this petition.
11 We simply are not aware -- were not aware of the Teljet
12 matter, and would have the same position with regard to
13 the operation of any CLECs within their service territory
14 and the absence of following the procedures that we
15 believe are appropriate. So, we did not intend to act in
16 a discriminatory manner.

17 And, the authorization that we are
18 challenging is the CLEC authorization. To the extent
19 segTEL is engaged in business as a CTP, that it has
20 interstate business, that it performs unregulated data
21 services, we're not challenging those. It's the CLEC
22 authorization that we're challenging.

23 CHAIRMAN GETZ: Okay. All right. Then,
24 is there anything further to address? Mr. Katz.

1 MR. KATZ: Just if I could respond to
2 Commissioner Ignatius's question on just simply impacting
3 us. There is -- a lot of business in competitive
4 telecommunications is about time to market, delay, and
5 market perception. And, anything that would restrict
6 segTEL from being able to advertise its services, while
7 parties who are completely not cognizant of this docket
8 and not named, could, you know, still go forward and
9 promote their services would put us in a market
10 disadvantageous situation. So, you know, again, I'd ask,
11 if there's anything, any restriction during the pendency
12 of the docket that would be put forward, it has to be put
13 forward on a generic basis to all similarly situated
14 entities such as segTEL.

15 And, furthermore, going to the 253
16 barrier to entry issue, if we were to be restricted during
17 the pendency of this proceeding, which could be lengthy
18 and have many issues, that, to us, would serve to continue
19 to underscore our belief that this is creating yet another
20 barrier to entry that would be preempted by 253 of the
21 Telecom Act.

22 CHAIRMAN GETZ: Okay. Thank you. Last
23 opportunity, Mr. Coolbroth, as the Petitioner?

24 MR. COOLBROTH: Nothing further.

1 CHAIRMAN GETZ: Okay. Well, what we'll
2 do is close this prehearing conference. I take it that
3 what would be -- and then we would move into the
4 prehearing conference in the IDT and Metrocast cases. Is
5 it my -- is it the expectation of the parties there would
6 be a joint technical session afterwards, with respect to
7 procedures? Or, are you going to break up? Or shouldn't
8 I even worry about that?

9 MR. FOSSUM: It was Staff's expectation
10 that it would be a joint technical session.

11 CHAIRMAN GETZ: Okay.

12 MR. FOSSUM: I can't speak for any of
13 the other parties to this or the other docket.

14 CHAIRMAN GETZ: Well, I guess I can
15 leave that to everyone. I guess, Mr. Phillips, we can --
16 were you rising to speak or --

17 MR. PHILLIPS: Mr. Chairman, I was
18 rising to speak. I'm Paul Phillips, from Primmer, Piper,
19 Eggleston & Cramer. And, I'm here for the later
20 prehearing conferences representing Union Telephone
21 Company. And, you had just raised the question of whether
22 there should be a joint technical work session following
23 the prehearing conferences. Our desire is to keep the
24 matters separate. We understand there's obviously a

1 common legal issue, in terms of the federal preemption
2 question. But, if we can get past that, there are some
3 substantive issues in the IDT application that affect
4 Union Telephone that we are interested in engaging with
5 IDT over and not other parties.

6 So, I guess I'll put that out there for
7 you to consider. We're not really interested in getting
8 into, you know, substantive settlement talks with other
9 parties, --

10 CHAIRMAN GETZ: Well, that's
11 understandable.

12 MR. PHILLIPS: -- if we can avoid it.

13 CHAIRMAN GETZ: Okay. All right. Well,
14 let's close this prehearing conference, and we'll take the
15 matter under advisement.

16 (Whereupon the prehearing conference
17 ended at 10:38 a.m.)

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