

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

**DRM 08-126**

**RULEMAKING  
Puc Chapter 400 – Telephone**

**COMMENTS OF COMMISSION STAFF  
CONCERNING PROPOSED AMENDMENT TO PUC RULE 431.01**

Commission Staff wishes to comment on the proposed change to Puc 431.01(d) which eliminates the word “non-exempt” in referring to ILECs in the CLEC registration process. Non-exempt refers to ILECs which are not subject to the rural exemption contained in 47 U.S.C. § 251(f). Effective September 5, 2008, the New Hampshire Legislature repealed RSA 374:22-f which required small ILEC service territories to be exclusive, except under limited circumstances. On the same date changes to RSA 374:22-g became effective requiring all ILECs, regardless of size, to have non-exclusive service territories. RSA 374:22-g authorizes the Commission to allow multiple telecommunications providers to serve within any ILEC service territory when the Commission finds such competitive entry to be for the public good. RSA 374:22-g requires the Commission to consider certain interests when it makes a public good determination.

The question to be addressed in this rulemaking is whether Puc 431.01, as amended, represents an appropriate balance of the interests described in RSA 374:22-g and is consistent with the public good. Staff begins by describing the federal statutory framework applicable to our CLEC registration rules and then analyzes the corresponding New Hampshire statutes.

### **A. Federal Statutory Analysis**

Both large and small ILECs are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level the distinction between rural and non-rural ILEC's is that rural ILECs are exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide offer and the state regulator has considered any economic burdens associated with unbundling the rural ILEC's network. *See*, 47 U.S.C. §§ 251 (c) and (f). Under the 1996 Telecom Act, ILECs subject to the rural exemption are not protected from competitive entry. In fact, 47 U.S.C. § 251 (b) makes clear that they must interconnect with other carriers operating in their service territory. Thus, rural ILECs, which are generally smaller carriers, are not currently required to unbundle their networks for CLECs, however, small ILECs must allow CLECs to operate in their service territories, interconnect with, and exchange traffic with those CLECs.

The 1996 TelAct specifically prohibits states from creating barriers to the entry of competition. 47 U.S.C. § 253. As a result, Commission rules should not allow small ILECs in New Hampshire to erect barriers to competitive entry and the CLEC approval process under the rules should not become such a barrier. As will be discussed in more detail below, the Commission's CLEC registration rules provide for a streamlined and efficient process for competitors to enter the local telecommunications market. *See*, N.H. Code of Admin. Rules Puc 431.01. The rules, as amended, promote competitive telecommunications markets by eliminating barriers to entry and therefore comply with federal statutes. *See*, 47 U.S.C. §§ 251 (a) and (b) and 253.

## **B. State Statutory Authority**

RSA 374:22-g, III provides the Commission with specific authority to promulgate rules to enforce the section. When the Commission exercised the rulemaking authority delegated to it by RSA 374:22-g and updated the Puc 431 rules in 2005 it considered the public good, including competition, fairness, economic efficiency, universal service, carrier of last resort obligations, and an ILEC's ability to earn a reasonable return and recover costs incurred to serve CLECs.

The proposed amendment to the CLEC registration rules would make it clear that CLECs may register to compete in small ILEC service territories. Consistent with RSA 374:22-g, the proposed amended Puc 431.01 supports competition, fairness and economic efficiency by allowing for a simple and speedy process to register a CLEC and by eliminating unnecessary barriers to CLEC entry into both small and large ILEC service territories.

Consistent with RSA 374:22-g, the proposed amended Puc 431.01 allows both small and large ILECs to earn a reasonable return. The whole exercise of setting just and reasonable rates for regulated utilities is meant to set rates that are a reasonable proxy for a competitive market. Such an exercise is needed precisely when competition is essentially lacking. On the other hand, if competition is sufficiently robust, the rates that are borne by the market are expected to provide adequate returns to investors without exposing the customers to market power abuse. In some cases the development of a competitive market may cause the ILEC to, either lose customers, or find ways to reduce costs.<sup>1</sup> Nonetheless, competition, when it is working, by definition, provides just and reasonable returns to investors, including utility investors.

While wireless service has provided greater alternatives to small ILEC customers, for a more competitive environment (which is the legislative intent under RSA 374:22-g), it is

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<sup>1</sup> In recognition of the pressures on small ILECs created by competitive markets the legislature has provided for small ILECs to request pricing flexibility and less regulation. *See*, RSA 374:3-b.

important that CLEC service is encouraged. While the Commission, to the extent it still regulates utilities' rates of return, will be vigilant in ensuring that the ILEC has the opportunity to realize a reasonable return on its investment, Staff believes that wireline alternatives would encourage competition and economic efficiency significantly more than wireless alternatives already do. Puc 431.01, as amended in the initial proposal, is consistent with the intent to encourage competition, economic efficiency and the incumbent's opportunity to realize reasonable return

Puc 431.01, as amended in the initial proposal, allows for adequate support of the ILECs' universal service and carrier of last resort obligations. The burden of universal service may be more expensive for small rural ILECs than for larger ILECs. Under the current federal statutory scheme, however, small rural ILECs operating in high cost service areas are compensated for this obligation through the universal service fund. *See*, 47 U.S.C. § 254. The Puc Part 431 rules, allow unencumbered CLEC entry into ILEC service territories with the understanding that ILECs with high costs to serve customers will receive additional support from the universal service fund to make up any shortfall created by competitive prices.

The Puc Part 431 rules, as amended in the initial proposal, do not prevent either small or large ILECs from recovering any costs incurred to serve CLECs. ILECs are free to recover those costs through agreements negotiated with CLECs. The process of establishing an agreement is an adequate vehicle to recover ILEC costs, and is available to small and large ILECs alike. Staff believes that small ILECs cost recovery is adequately protected by their ability to negotiate the price and terms of traffic exchange with CLECs just as they currently do with wireless carriers serving customers in their service territories.

Staff sees no sound policy reason to promulgate separate rules for small ILECs. To treat small ILECs differently than large ILECs for purposes of CLEC registration, would be contrary to our statutory directive in RSA 374:22-g and would also be inconsistent with federal law requiring entry into both small and large ILEC service territories. Instead, consistent with the enabling legislation, RSA 374:22-g, as well as federal law, Puc Part 431, as amended in the initial proposal, provides for a streamlined process for CLEC registration to compete in both small and large ILEC service territories. Staff believes that such a simple registration process is fully consistent with the public good.

Respectfully submitted:

STAFF OF THE PUBLIC UTILITIES COMMISSION

By its Attorney



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F. Anne Ross, Esq.  
21 South Street Suite 10  
Concord, NH 03301  
603-271-2431  
603-271-4033 fax

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