

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**METROCAST CABLEVISION OF  
NEW HAMPSHIRE, LLC APPLICATION  
FOR CERTIFICATION DATED  
SEPTEMBER 19, 2008**

**UNDOCKETED,  
CLEC NO. C01-005-07**

**MOTION OF UNION TELEPHONE COMPANY  
TO RESCIND AUTHORITY ISSUANCE, FOR PROCEDURES CONSISTENT  
WITH LAW, AND FOR REHEARING**

Union Telephone Company d/b/a Union Communications (“Union”) hereby moves that the authority issued to MetroCast Cablevision of New Hampshire, LLC (“MetroCast”) dated September 30, 2008 be rescinded due to:

1. the failure of the Commission to provide notice to interested parties, an opportunity for hearing and make required findings pursuant to RSA 374:26, 374:22-g and 374:22-e, as well as Puc 203.12, RSA 541-A:31 and RSA 541-A:35, prior to issuing or authorizing the issuance of such authority;
2. the failure of the Commission to comply with RSA 363:17-b and RSA 541-A:35 which require the issuance of a final order by the Commission, which order is required to include the parties, their positions, findings of fact, conclusions of law, and an indication of the action of each Commissioner who participated in the matter;
3. the mistake of fact and law involved in the Commission (or its staff) utilizing Puc 431.01 and its Chapter 431 process, as said rule and Chapter only

authorizes issuances of registrations in areas served by non-exempt ILECs, for the area served by Union is not served by a non-exempt ILEC; and

4. for the other reasons detailed herein.

Union also moves that, to the extent the Commission addresses the MetroCast application for authority after rescinding the issuance of September 30, 2008, that it follow the legal requirements for considering such authority, including the requirements listed above and as detailed herein.

To the extent the foregoing is not granted, Union moves for rehearing of the Commission's authority related issuance of September 30, 2008 due to the Commission's failure to comply with the legal requirements as detailed above and herein. Failure to comply with such statutes, the Commission's own rules and other errors of law detailed herein deprives Union of its due process rights under those statutes, rules and the US and New Hampshire Constitutions and of equal protection under the laws as guaranteed under equal protections under the laws under the US and New Hampshire Constitutions.

In support hereof, Union states the following:

#### **FACTS**

1. Union is a New Hampshire Corporation, is a public utility as defined in RSA 362:2 and is regulated by the Commission. Union provides telecommunications services to residential and business customers and access services to utilities. Union has less than 8,000 access lines. Union is a rural telephone company as that term is defined at 47 USC §153 (37) and as that term is used in 47 U.S.C. § 251 (f)(1). Union has not waived the exemption provided to rural telephone companies under that section of the federal statutes. Union is the incumbent telephone utility serving a territory that includes

all or portions of: Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham, and Strafford, New Hampshire.

2. On or about September 22, 2008 MetroCast filed a CLEC application for registration which was labeled as an amendment to a prior registration attached hereto as exhibit 1. Said filing was dated September 19, 2008 and received at the Commission on or about September 22, 2008

3. On September 30, 2008, the Commission issued a certificate which purports to authorize MetroCast to provide local exchange service in all the areas served by Union which includes areas in the municipalities of Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham, and Strafford. Said issuance is attached hereto as exhibit 2.

4. The Commission did not provide Union with, nor did it issue or require any notice of the application or provide notice of any opportunity for hearing. To the best of Union's knowledge, there was no hearing or opportunity for hearing. The Commission's September 30, 2008 issuance does not contain any findings of fact or conclusions of law. The issuance also contains no finding of public good.

5. The grant of such authority in Union's territory may have an impact upon "the incumbent utilities opportunity to realize a reasonable return on its investments", may have an impact on universal service and may have an impact on meeting carrier of last resort obligations in the Union service territory. Union's rights and privileges are directly impacted by a grant of authority to MetroCast to provide telecommunications service in the Union service territory.

6. No order was issued by the Commissioners granting authority to MetroCast.

7. Union learned of the September 30, 2008 issuance on October 8, 2008. Union has acted expeditiously to make this filing and reserves the right to supplement it as needed.

8. To the best of Union's knowledge, the municipalities that Union provides service were not provided notice of the MetroCast application or approval.

### **ANALYSIS AND ARGUMENT**

#### **I. THE AUTHORITY IS INVALIDLY AND UNLAWFULLY ISSUED AS THE COMMISSION MUST PROVIDE NOTICE TO INTERESTED PARTIES, A HEARING AND FINDINGS OF FACT AND CONCLUSIONS BASED UPON CONSIDERATION OF PARTICULAR FACTORS AS A BASIS FOR ISSUING SUCH AUTHORITY**

This issuance of September 30, 2008 involves errors of law because under RSA 374:26, 374:22-g, 374:22-e, 541-A:31 and other applicable law, the Commission is required to provide for a hearing, make findings based upon evidence before it which address particular factors in those statutes and then to make conclusions based on those findings on whether granting MetroCast application is in the public good. Such evidence findings and conclusions must be specific to the service territory and applicant involved in a request for authority.

Actions by administrative agencies that involve the legal rights and privileges of parties, such as the rights of the MetroCast and the Union (the incumbent telephone utility in this matter), are contested cases as defined by the New Hampshire Administrative Procedure Act. RSA 541-A:1(IV). New Hampshire statutes and Commission rules require adjudicatory procedures which require notice and hearing in

such situations. RSA 541-A:1(I), 541-A:31 through 541-A:38, Puc 203.12. RSA 374:22-e also requires notice to interested parties in actions involving authorizations for more than one telephone utility in a service territory.

Administrative agencies, such as the Commission, must act within their delegated powers. *Appeal of Concord Natural Gas Corp*, 121 N.H. 685, 689 (1981); *Kimball v. N.H. Board of Accountancy*, 118 N.H. 567, 568 (1978). Rules and orders adopted by state agencies may not add to, detract from or in any way modify the statutory law. See *Kimball, supra*. Thus, the Commission's rules do not in any way limit the legal requirements discussed above as required by RSA 374:26, 374: 22-g, 374:22-e and other applicable law or limit the rights of Union or any other party pursuant to the US and New Hampshire Constitutions.

In docket DT 08-013, *RE: Comcast Phone of New Hampshire, LLC Request for Authority*, ORDER GRANTING HEARING (August 18, 2008), the Commission provided an opportunity for hearing, after previously noticing said matter. In so ruling it stated "[w]e will schedule a hearing pursuant to RSA 374:26, which requires a hearing if all interested parties are not in agreement, to consider evidence by Comcast and other parties concerning whether a grant of franchise authority to Comcast in the KTC, MCT and WTC service territories is for the public good."

In contrast, in the case at hand, the Commission conducted no inquiry to see if parties were in agreement, and provided no notice to interested parties (such as Union), no procedure to request a hearing and no opportunity for hearing. The different treatment provided to Union and others who may be interested in this case versus interested parties in the above referenced Comcast case is unjustified and arbitrary, is

without basis in law, and denies Union and other interested parties in this case their due process rights and equal protection of the laws as guaranteed by the US and New Hampshire Constitutions.

**II. THE AUTHORITY IS INVALIDLY AND UNLAWFULLY ISSUED AS THE COMMISSION FAILED TO COMPLY WITH THE REQUIREMENT TO ISSUE A FINAL ORDER**

The application for authority by MetroCast is a request for authority to operate as a public utility as defined by RSA 362:2 and is governed by RSA 374:26, 374:22- g and 374:22-e. RSA 363:17-b requires the issuance of a final order by the Commission on *all* matters presented to it. That statute requires that such orders reflect, among other things, the parties, the position of the parties and the concurrence or dissent of each commissioner participating in the matter.

Similarly, RSA 541-A:35 requires the Commission to issue final orders in contested cases such as this one which include findings of fact and conclusions of law. In fact, there is no evidence in the issuance that any Commissioner even participated in the issuance of the September 30, 2008 authorization letter. Thus, the Commission should rescind the issuance of September 30, 2008 authorization letter.

**III. COMMISSION RULE 431.01 CANNOT BE THE BASIS OF AUTHORITY IN THE TERRITORY OF UNION BECAUSE IT IS NOT THE TERRITORY OF A “NON-EXEMPT ILEC”.**

The explicit language of Commission rule Puc 431.01 only applies in the territories of non-exempt ILECs, which Union Telephone Company is not. Thus, any document that purports to provide authority in Union’s territory issued pursuant to that rule is invalid and should be rescinded.

Commission rule Puc 431.01(g) states that an issuance under that rule “authorizes the applicant to provide competitive local exchange service in the territory of *non-exempt ILECs*”(emphasis added). Commission rule Puc 402.33 provides that “[n]on-exempt ILEC means an ILEC that is not exempt pursuant to 47 U.S.C. §251(f).” As stated above and supported by the attached affidavit, Union is a rural telephone company as that term is used in 47 U.S.C. § 251 (f)(1). Union has not waived the exemption provided to rural telephone companies under 47 U.S.C. §251(f). Thus, the Union territory is not territory of a non-exempt ILEC.

Since the rule only purports to provide for authority in the territory of non-exempt ILECs and since Union’s territory is not such a territory, the rule does not apply to issuances of authority in Union’s territory. Entities who file applications for authority in portions of an ILEC that is not a non-exempt ILEC, such as the MetroCast request, are required to file a petition that complies with Commission rules Puc 203.05 and 203.06, among others. Thus, the Commission should rescind the September 30, 2008 issuance as it is not authorized under the rule it was issued under.

#### **IV. THE COMMISSION ERRED IN NOT NOTIFYING MUNICIPALITIES OF THE METROCAST APPLICATION FOR AUTHORITY IN THE MATTER**

RSA 541-A:39 requires that the Commission:

[s]hall give notice to and afford all affected municipalities reasonable opportunity to submit data, views, or comments with respect to the issuance of a permit, license, or any action within its boundaries that directly affects the municipalities. Such action shall include those which may have an effect on land use, land development, or transportation; those which would result in the operation of a business....

Under this provision, the Commission was required to provide notice to municipalities of the MetroCast application<sup>1</sup>. To the best of Union's knowledge, it did not. This is an additional reason the September 30, 2008 issuance should be rescinded.

**V. THE FORGOING ERRORS OF FACT AND LAW ARE ALSO THE BASIS OF UNION'S MOTION FOR REHEARING PURSUANT TO RSA 541:3**

Union's motion is also a motion for rehearing pursuant to RSA 541:3. As detailed above, the Commission erred as a matter of law in authorizing the September 30, 2008 issuance. Thus, the issuance should be rescinded

**CONCLUSION**

For the foregoing reasons, the Commission should rescind the authority related issuance of September 30, 2008 involving MetroCast.

Respectfully submitted,

**UNION TELEPHONE COMPANY d/b/a  
UNION COMMUNICATIONS**



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

Rothfelder Stern, L. L. C.

625 Central Avenue

Westfield, NJ 07090

Phone: (908) 301-1211

Fax: (908) 301-1212

e-mail: [mcrothfelder@rothfelderstern.com](mailto:mcrothfelder@rothfelderstern.com)

October 10, 2008

---

<sup>1</sup> As MetroCast provides cable service, the municipalities where MetroCast requests authority presumably have cable franchises with MetroCast and municipal rights-of way that are used by MetroCast.