

STATE OF NEW HAMPSHIRE  
SUPREME COURT

DOCKET NO. 2009-0168 (Consolidated)

Appeal of  
Union Telephone Company d/b/a Union Communications

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SUPPLEMENTAL MEMORANDUM OF PETITIONER-APPELLANT

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Attorney Martin C. Rothfelder  
N. H. Attorney No. 2880  
Rothfelder Stern, L.L.C.  
625 Central Avenue  
Westfield, NJ 07090  
Phone: (908) 301-1211  
e-mail: [mcrothfelder@rothfelderstern.com](mailto:mcrothfelder@rothfelderstern.com)

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Union Telephone Company (“Union”), appellant herein, provides this memorandum in response to the Order of the Supreme Court issued March 3, 2010.

## **INTRODUCTION AND BACKGROUND**

Union has asserted that it has a constitutionally protected property interest at stake in this case. More specifically, Union has asserted that, as an incumbent utility, it has the right to an “opportunity to realize a reasonable return on its investment” that the PUC must consider as a statutorily mandated factor in authorizing competitive telecommunications services in Union’s territory. Union Initial Brief, pp. 20-22. Union further has asserted that the failure of the PUC to provide Union with notice and an opportunity for hearing on the MetroCast and IDT applications for operating authority in Union’s territory, and the PUC’s approvals thereof, violated Union’s constitutionally protected due process rights, citing in support *Appeal of Public Service of New Hampshire*, 122 N.H. 1062, 1072, 454 A.2d 435, 441 (1982). *Id.*

The Order of March 3, 2010 cites to the three-prong test set forth *In the Matter of Stapleford & Stapleford*, 156 N.H. 260, 264 (1982) for determining whether particular procedures comport with requirements of constitutional due process. For purposes of this memorandum, the Court has asked the parties to “accept Union’s assertion that its right to realize a reasonable return on its investment is entitled to constitutional protection.” The Court has asked the parties to address the other two prongs of the test, which are “(1) 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 (2) the government’s interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would involve.” Union

respectfully asserts that application of these prongs of the test to the PUC's procedural actions and omissions in these cases must result in a finding that Union's constitutional due process rights have been violated.<sup>1</sup>

## **ARGUMENT**

### **I. FAILURE TO PROVIDE NOTICE AND AN OPPORTUNITY FOR HEARING RISKS ERRORS AND HARM TO UNION**

RSA 374:22-g requires the PUC to have considered, among other factors, Union's "opportunity to realize a reasonable return on its investment" in finding whether granting operating authority to MetroCast and IDT in Union's territory is consistent with the "public good." The record in these cases is devoid of any factual inquiry or fact finding by the PUC in evaluating the impact of its actions granting authority on Union's right to that opportunity. By not affording Union with an opportunity to be heard during the pendency of the MetroCast and IDT applications, and in the process failing to develop facts to support required findings by law, the PUC has risked an erroneous deprivation of Union's constitutionally protected right.

Union asserts that the inherent risk in these cases depriving Union of its constitutionally protected property interest cannot be considered mere speculation. Recently, the New York Public Service Commission found that, due largely to competition in their service territories, many of New York's rural incumbent local exchange carriers ("ILECs") were earning negative returns on their investment, and that in 2007 alone, the state's 29 rural ILECs had reported that they had lost on average almost 7% of access lines and 15% of minutes of use. NY PSC Case 07-C-0349, *In the*

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<sup>1</sup> Union notes that it has argued that the PUC has a statutory obligation to provide Union with an opportunity for notice and hearing in these cases. Union Initial Brief, pp. 15-20; Union Reply Brief, pp. 2-3. Thus, Union respectfully submits that the Court can find for Union in these cases regarding notice and hearing requirements on statutory grounds.

*Matter of Examining a Framework for Regulatory Relief*, Order Adopting a Framework, pp. 3-4 and Appendix D (March 4, 2008)( App. pp. 3-4, 31.) In order to remedy this negative impact, the New York Commission granted rural ILECs facing such negative impacts from competition authority to file for specified, preapproved increases in local service rates and flexibility in all other rates (even though such relief was not formally requested by those companies). *Id.*, pp, 5, 12-15; Appendix A)(App. pp. 5, 12-15, 19-23).

The only facts the PUC purports to have considered regarding any impact to Union are contained in the Orders on Rehearing, neither of which specifically addressed the impact of granting the applications on Union's "opportunity to realize a reasonable return on its investment." Even if any of the cited facts could be construed to address such impact, Union had no opportunity to contest any of them and protect its constitutional right. In that regard, Union is in the same position as the appellant in *Appeal of Public Service of New Hampshire, supra*. There, the Commission made a finding of imprudent utility expenditures based on information extraneous to the hearing record. The utility had no opportunity to contest in a hearing before the PUC the information on which the PUC based its imprudence findings. Because those findings may have had an impact on the utility in future matters, the Court found a constitutional due process violation. *Id.*, at 1072-73.<sup>2</sup>

It should be apparent to the Court that, even if a statutory right to notice and hearing is deemed lacking, it can conclude that there is considerable and probable value in "additional" or "substitute" procedures in order to address the statutorily mandated

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<sup>2</sup> In its Initial Brief, Union cited to several facts cited by the PUC that appeared only in the Orders for Rehearing. For example, the PUC made reference to facts regarding the federal universal support funds Union receives, which Union has asserted includes errors. Union Initial Brief, pp. 22-23. Such erroneous findings of fact can have an impact on future matters affecting Union in violation of its constitutional due process rights.

review factor of, and Union's constitutionally protected right to, an "opportunity to realize a reasonable return on its investment." Notice and opportunity for a hearing to develop a full record and make findings of fact are basic procedures to avoid erroneous risks in deprivation of constitutionally protected rights, which opportunity the PUC could readily have afforded and should have afforded Union in these cases.

**II. THE FISCAL AND ADMINISTRATIVE "BURDEN" OF PROVIDING UNION WITH NOTICE AND OPPORTUNITY FOR HEARING IS AT MOST *DE MINIMIS*.**

The PUC's record of cases handled pursuant to RSA 374:22-g demonstrates that the PUC would not incur undue fiscal or administrative burdens in providing Union with notice and opportunity for hearing in these cases.

In 1997, the PUC began authorizing competition in local exchange services. Pursuant to RSA 374:22-g, it preceded such action with a rulemaking to enact rules to govern this process.<sup>3</sup> Union's research of the PUC's reported, relevant orders reveals that 165 orders *nisi* were issued from 1997 through 2005. These orders provided authority to allow competitive local exchange telecommunications service in the service territory of New Hampshire's dominant ILEC (now FairPoint Communications).<sup>4</sup>

All of these 165 orders *nisi* subjected the grant of operating authority to the expiration of a notice period and opportunity to request a hearing by any interested party, and the PUC reserved the authority to suspend the grant of authority pending a hearing. The PUC's procedures in these cases clearly contemplated the potential for hearings. Research indicates that in these 165 cases no additional orders addressing requests for hearings or challenges or comments by third parties were issued.

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<sup>3</sup> *Freedom Ring Telecommunications, LLC*, 82 NH PUC 288 (March 24, 1997).

<sup>4</sup> Citations to the 165 orders *nisi* granting authority appear at the end of this memorandum.

These orders *nisi* did not present substantial administrative burdens to the PUC. The orders required the applicant to publish the notice and file an affidavit of publication with the PUC. Thus, any “burden” on the PUC involved at most some additional language in the orders, addressing any publication issues, and responding to any filed comments. These actions impose at most *de minimis* burdens on the PUC, if they are considered to be burdens at all. After 2005, there were no additional orders *nisi* addressing such authority in the dominant ILEC territory.

In 2008, the PUC issued an order *nisi* that, if allowed to go into effect, would for the first time have granted authority to provide competitive local exchange service in the service territories of non-dominant, ILECs.<sup>5</sup> In response to requests by those ILECs, the Commission suspended the order *nisi* and scheduled an evidentiary hearing.<sup>6</sup> Subsequently, the PUC cancelled the hearing at the request of the parties and issued an order granting the authority based upon pre-filed testimony and briefs submitted by the parties.<sup>7</sup>

There is nothing associated with the MetroCast and IDT cases on appeal by Union here suggesting the PUC would suffer a fiscal or administrative “burden” any greater than the PUC was prepared to incur in the 166 prior cases discussed above. At most there will be a hearing and decision. None of those prior cases involved an actual hearing and

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<sup>5</sup> *Comcast Phone of New Hampshire, LLC Request for Authority to Provide Local Telecommunications Services*, 93 NH PUC 175 (April 4, 2008). Union found no other orders *nisi* addressing competitive telecommunications authority after 2005.

<sup>6</sup> *Comcast Phone of New Hampshire, LLC Request for Authority to Provide Local Telecommunications Services*, 93 NH PUC 226, 228 (May 2, 2008); *Comcast Phone of New Hampshire, LLC Request for Authority to Provide Local Telecommunications Services*, 93 NH PUC 420, 421 (August 18, 2008).

<sup>7</sup> PUC docket DT 08-013 – *Comcast Phone of New Hampshire, LLC Request for Authority to Provide Local Telecommunications Services*, Order Granting Authority (February 6, 2009). App. pp. 32-54.

only one involved any contest or opposition from outside parties. Thus, any assumptions that future cases will regularly require hearings are unwarranted. In sum, there is no basis in the history of the orders *nisi* that extend notice and opportunity for hearing or in the case at hand which would indicate a likelihood of substantial burdens created by providing notice and an opportunity for hearing.

### CONCLUSION

There were not and there are not undue burdens on, or any other impediment to, the PUC providing Union with an opportunity for a hearing in these cases on appeal in order to address and, if needed, remedy any impact to Union's constitutionally protected property rights. Thus, the three-prong test under *In the Matter of Stapleford & Stapleford, supra* to determine procedures to comport with safeguarding constitutional due process dictates that the PUC should have granted Union an opportunity for a hearing on the subject applications for operating authority. While Union believes that the Court can reverse the orders in these cases on statutory grounds, the constitutional infirmities in the PUC's actions are present if the Court determines to decide these cases on that basis. For these reasons, the Court should reverse the PUC's decisions appealed by Union herein.

Respectfully submitted,

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

By its Attorneys  
Rothfelder Stern, L. L. C.  
625 Central Avenue  
Westfield, NJ 07090

Date: 3-31-2010

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

**CITATIONS TO THE 165 ORDERS NISI PROVIDING COMPETITIVE LOCAL SERVICE AUTHORITY FROM 1997-2005 (referenced in footnote 4)**

*Freedom Ring Telecommunications, LLC*, 82 NH PUC 288 (March 24, 1997); *Vitts Corporation*, 82 NH PUC 391 (May 1, 1997); *Excel Telecommunications Inc.*, 82 NH PUC 409 (May 13, 1997); *KMC Telecom Inc.*, 82 NH PUC 412 (May 13, 1997); *Sprint Communications Company L.P.*, 82 NH PUC 443 (May 28, 1997); *Preferred carrier Services, Inc.*, 82 NH PUC 473 (June 17, 1997); *Telco Holdings Inc. dba Dial and Save*, 82 NH PUC 475 (May 17, 1997); *Tel-Save Inc dba The Phone Company of New Hope*, 82 NH PUC 476 (June 17, 1997); *Business Long Distance Inc.*, 82 NH PUC 478 (June 17, 1997); *U S West Interprise America Inc.*, 82 NH PUC 500 (July 1, 1997); *MCImetro Access Transmission Services Inc.*, 82 NH PUC 502 (July 1, 1997); *ST Long Distance, Inc.*, 82 NH PUC 518 (July 8, 1997); *WinStar Wireless of New Hampshire, Inc.*, 82 NH PUC 520 (July 8, 1997), *U S West Interprise America Inc.*, 82 NH PUC 524 (July 10, 1997), *MFS Intelenet of New Hampshire Inc.*, 82 NH PUC 573 (July 29, 1997); *New England Fiber Communications LLC*, 82 NH PUC 623 (August 27, 1997); *LCI International Telecom Corporation*, 82 NH PUC 625 (August 27, 1997); *TCG New Hampshrie Inc.*, 82 NH PUC 651 (September 4, 1997); *Metracom Corporation dba Lukechop*, 82 NH PUC 652 (September 4, 1997); *AT&T Communications of New Hampshire Inc.*, 82 NH PUC 675 (September 16, 1997); *EZ Tel Corporation dba Massachusetts Wholesale Telephone*, 82 NH PUC 698 (September 23, 1997); *XCOM Telephony Inc.*, 82 NH PUC 722 (October 13, 1997); *GTE Communications Corporation*, 82 NH PUC 738 (October 21, 1997); *Atlas Communications LTD dba ACS Communications*, 82 NH PUC 742 (October 21, 1997), *LDM Systems Inc.*, 82 NH PUC 743 (October 21, 1997), *Easton Telecom Services Inc.*, 82 NH PUC 745 (October 21, 1997); *Group Long Distance, Inc.*, 82 NH PUC 783 (November 4, 1997); *Frontier Telemanagement Inc.*, 82 NH PUC 785 (November 4, 1997); *CTC Communications Corporation*, 82 NH PUC 812 (November 19, 1997); *Quintelco Inc.*, 82 NH PUC 856 (December 16, 1997); *USN Communications Northeast Inc.*, 83 NH PUC 4 (January 5, 1998); *Digital Signal Communications Inc.*, 83 NH PUC 13 (January 6, 1998); *Third Rail Wireless Services Inc.*, 83 NH PUC 15 (January 6, 1998); *North American Telecommunications Corporation*, 83 NH PUC 16 (January 6, 1998); *Jerry La Quiere dba Lec-Link*, 83 NH PUC 195 (March 24, 1998); *Comm South Companies Inc.*, 83 NH PUC 302 (May 14, 1998); *Global NAPS, Inc.*, 83 NH PUC 383 (July 8, 1998); *ICG Telecom Group Inc.*, 83 NH PUC 427 (August 5, 1998); *Business Communications Networks dba Lightship Telecom L.L.C.*, 83 NH PUC 458 (September 1, 1998); *New England Voice and Data L.L.C.*, 83 NH PUC 460 (September 2, 1998); *Level 3 Communications L.L.C.*, 83 NH PUC 461 (September 2, 1998); *Network Plus, Inc.*, 83 NH PUC 481 (September 14, 1998); *DIECA Communications Inc.*, 83 NH PUC 514 (October 6, 1998); *RNK, Inc.*, 83 NH PUC 592 (October 28, 1998); *PaeTec Communications Inc.*, 83 NH PUC 594 (October 28, 1998); *MediaOne Telecommunications of New Hampshire Inc.*, 83 NH PUC 680 (December 15, 1998); *HarvardNet, Inc.*, 83 NH PUC 691 (December 21, 1998); *EZ Talk Communications LLC*, 84 NH PUC 139 (February 22, 1999); *Net2000 Communications Services, Inc.*, 84 NH PUC 144 (February 22, 1999); *Dakota Services, Ltd.*, 84 NH PUC (March 9, 1999);

*Hyperion Communication of New Hampshire*, 84 NH PUC 166 (March 16, 1999); *RCN Telecom Services of New Hampshire Inc.*, 84 NH PUC 238 (April 6, 1999); *DSLnet Communications LLC*, 84 NH PUC 241 (April 12, 1999); *SegTEL Inc.*, 84 NH PUC 270 (May 3, 1999); *CoreComm New Hampshire, Inc.*, 84 NH PUC 281 (May 11, 1999); *Fairpoint Communications Corporation*, 84 NH PUC 297 (June 1, 1999); *Atlantic Connections, LLC*, 84 NH PUC 307 (June 8, 1999); *NorthPoint Communications, Inc.*, 84 NH PUC 309 (June 8, 1999); *Choice One of New Hampshire Inc.*, 84 NH PUC 336 (June 22, 1999); *ACI Corporation dba Accelerated Connections*, 84 NH PUC 337 (June 22, 1999); *Concert Communications Sales, LLC*, 84 NH PUC 345 (June 29, 1999); *2<sup>nd</sup> Century Communications, Inc.*, 84 NH PUC 347 (June 29, 1999); *Creative Telecom Solutions, Inc.*, 84 NH PUC 348 (June 29, 1999); *JATO Operating Two Corporation*, 84 NH PUC 440 (August 16, 1999); *CCCNH, Inc. dba Total Connect*, 84 NH PUC 532 (October 6, 1999); *KMAR Communications, Inc.*, 84 NH PUC 542 (October 12, 1999); *KMAR Communications, Inc.*, 84 NH PUC 591 (November 9, 1999); *C12, Inc.*, 84 NH PUC 628 (November 23, 1999); *HJN Telecom, Inc.*, 84 NH PUC 630 (November 23, 1999); *MVX.COM Communications, Inc.*, 84 NH PUC 673 (December 7, 1999); *MVX.COM Communications, Inc.*, 85 NH PUC 43 (January 20, 2000); *OneStar Long Distance, Inc.*, 85 NH PUC 53 (February 3, 2000); *New Edge Network, Inc.*, 85 NH PUC 55 (February 3, 2000); *NOW Communications, Inc.*, 85 NH PUC 112 (march 13, 2000); *Essential.com, Inc.*, 85 NH PUC 119 (March 20, 2000); *Digital Broadband Communications, Inc.*, 85 NH PUC 121 (March 20, 2000); *Arbros Communications Licensing Company, N.E.*, 85 NH PUC 123 (March 20, 2000); *ServiSense.com, Inc.*, 85 NH PUC 336 (May 3, 2000); *Broadview Networks, Inc.*, 85 NH PUC 343 (March 3, 2000); *SBC Telecom, Inc.*, 85 NH PUC 345 (May 3, 2000); *Claricom Networks, Inc.*, 85 NH PUC 373 (May 9, 2000); *Williams Local Network, Inc.*, 85 NH PUC 377 (May 9, 2000); *MVX.COM Communications, Inc.*, 85 NH PUC 389 (May 16, 2000); *Maxcess, Inc.*, 85 NH PUC 391 (May 16, 2000); *Qwest Communications Corporation*, 85 NH PUC 400 (May 23, 2000); *Log On America, Inc.*, 85 NH PUC 402 (May 23, 2000); *Global Crossing Local Services, Inc.*, 85 NH PUC 413 (May 31, 2000); *Metromedia Fiber Network Services, Inc.*, 85 NH PUC 415 (May 31, 2000); *Universal Access, Inc.*, 85 NH PUC 417 (May 31, 2000); *NET-tel Corporation*, 85 NH PUC 419 (May 31, 2000); *Global Telephone Corporation*, 85 NH PUC 421 (May 31, 2000); *Transbeam, Inc.*, 85 NH PUC 449 (June 12, 2000); *Only One Communications, LLC*, 85 NH PUC 499 (July 6, 2000); *Telergy Network Services, Inc.*, 85 NH PUC 501 (July 6, 2000); *NECLEC, LLC*, 85 NH PUC 514 (July 24, 2000); *Choctaw Communications, Inc.*, 85 NH PUC 516 (July 24, 2000); *Access Point, Inc.*, 85 NH PUC 518 (July 24, 2000); *IPVoice Communications, Inc.* 85 NH PUC 667 (October 16, 2000); *TOTALink of New Hampshire, LLC*, 86 NH PUC 223 (April 2, 2001); *IDS Telcom, LLC*, 86 NH PUC 225 (April 2, 2001); *Telera Communications, Inc.*, 86 NH PUC 227 (April 2, 2001); *Pathnet Operating, Inc.*, 86 NH PUC 295 (April 23, 2001); *Essex Communications, Inc. dba eLEC Communications*, 86 NH PUC 378 (June 8, 2001); *Metro Teleconnect Companies, Inc.*, 86 NH PUC 395 (June 21, 2001); *Revolution Networks, LLC*, 86 NH PUC 514 (July 30, 2001); *McLeodUSA Telecommunications Services, Inc.*, 86 NH PUC 517 (July 30, 2001); *Z-Tel Communications, Inc.*, 86 NH PUC 524 (July 30, 2001); *Advanced TelCom Group, Inc. dba New Telcom Group*, 86 NH PUC 526 (July 30, 2001); *Metropolitan Telecommunications of New Hampshire, Inc.*, 86 NH PUC 529 (July 30, 2001); *Premiere*

*Network Services, Inc.*, 86 NH PUC 531 (July 30, 2001); *Prexar, LLC*, 86 NH PUC 576 (August 31, 2001); *IDS Telcom, LLC*, 86 NH PUC 612 (September 24, 2001); *Telera Communications, Inc.*, 86 NH PUC 614 (September 24, 2001); *DSCI Corporation*, 86 NH PUC 639 (October 5, 2001); *Equal Access Networks, LLC*, 86 NH PUC 658 (October 11, 2001); *Dark Air Corporation*, 86 NH PUC 660 (October 11, 2001); *A.R.C. Networks, Inc. dba InfoHighway*, 86 NH PUC 662 (October 11, 2001); *TeleCents Communications, Inc.*, 86 NH PUC 664 (October 11, 2001); *NTERA, Inc.*, 86 NH PUC 678 (October 19, 2001); *VarTec Telecom, Inc.*, 86 NH PUC 768 (November 16, 2001); *Vitcom Corporation*, 86 NH PUC 770 (November 16, 2001); *KMC Data, LLC*, 86 NH PUC 887 (December 7, 2001); *NOS Communications, Inc.*, 86 NH PUC 889 (December 7, 2001); *Norcom, Inc.*, 86 NH PUC 894 (December 10, 2001); *Equal Access Networks, LLC*, 86 NH PUC 923 (December 21, 2001); *segTEL, Inc.*, 87 NH PUC 27 (January 11, 2002); *NUI Telecom, Inc.*, 87 NH PUC 133 (March 8, 2002); *BBIS Communications, Inc.*, 87 NH PUC 136 (March 8, 2002); *Otel Telekom, Inc.*, 87 NH PUC 204 (March 29, 2002); *NUI Telecom, Inc.*, 87 NH PUC 276 (May 1, 2002); *Broadview NP Acquisition Corporation dba Broadview Net Plus*, 87 NH PUC 390 (May 31, 2002); *Excel Telecommunications, Inc.*, 87 NH PUC 405 (June 7, 2002); *United Systems Access Telecom, Inc.*, 87 NH PUC 408 (June 7, 2002); *Grainte Telecommunications, LLC, dba Hale and Father Telecommunications*, 87 NH PUC 472 (July 24, 2002); *Biddeford Internet Corporation*, 87 NH PUC 662 (October 4, 2002); *BullsEye Telecom, Inc.*, 87 NH PUC 664 (October 4, 2002); *MCImetro Access Transmission Services LLC*, 87 NH PUC 667 (October 8, 2002); *IDT America Corporation*, 88 NH PUC 63 (February 7, 2003); *American Long Lines, Inc.*, 88 NH PUC 152 (March 24, 2003); *Alticomm, Inc.*, 88 NH PUC 154 (March 24, 2003); *NEON Connect, Inc.*, 88 NH PUC 212 (April 25, 2003); *EliteView, LLC dba GroveLine*, 88 NH PUC 215 (April 25, 2003); *Covista, Inc.*, 88 NH PUC 328 (June 9, 2003); *XO Long Distance Services, Inc.*, 88 NH PUC 414 (September 5, 2003); *Volo Communications of New Hampshire, Inc.*, 88 NH PUC 635 (December 16, 2003); *Communications Solutions Partners, Inc.* 89 NH PUC 66 (January 30, 2004); *ComTech21, LLC dba 21C-Tech, LLC*, 89 NH PUC 138 (February 20, 2004); *KMC Telecom V, Inc.*, 89 NH PUC 205 (April 2, 2004); *Computer Network Technology Corporation*, 89 NH PUC 208 (April 2, 2004); *TSI Telecommunication Network Services, Inc.* 89 NH PUC 211 (April 2, 2004); *1 Com, Inc.*, 89 NH PUC 232 (April 23, 2004); *Internet and Telephone L.L.C.*, 89 NH PUC 235 (April 23, 2004); *Rural Economic Development Network, Inc.*, 89 NH PUC 331 (June 11, 2004); *KMC Telecom V, Inc.*, 89 NH PUC 345 (June 21, 2004); *Spectrotel, Inc.*, 89 NH PUC 364 (June 25, 2004); *ZONE Telecom, Inc.*, 89 NH PUC 480 (July 26, 2004); *Time Warner Cable Information Services (New Hampshire) LLC*, 89 NH PUC 483 (July 27, 2004); *Southwestern Bell Communications Services Inc. dba SBC Long Distance*, 89 NH PUC 571 (October 6, 2004); *Trans National Communications International, Inc.*, 89 NH PUC 575 (October 8, 2004); *North Atlantic Networks, LLC*, 89 NH PUC 696 (December 29, 2004); *Acceris Communications Corporation*, 90 NH PUC 123 (March 24, 2005); *On Fiber Carrier Services Inc.*, 90 NH PUC 144 (April 7, 2005); *France Telecom Corporate Solutions LLC*, 90 NH PUC 149 (April 7, 2005); *UCN, Inc.*, 90 NH PUC 154 (April 15, 2005); *ACN Communications Services, Inc.*, 90 NH PUC 304 (July 21, 2005).