

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 09-065

IDT AMERICA CORP.

**Application for Certification as a
Competitive Local Exchange Carrier**

Order Denying Motion to Rescind Authority and Motion for Rehearing

ORDER NO. 24,970

May 22, 2009

I. BACKGROUND

On February 27, 2009, IDT America Corp. (IDT) filed an application to amend its certification as a competitive local exchange carrier (CLEC) in New Hampshire to include, in addition to its existing service in the FairPoint¹ service territory, the service territory of Union Telephone Company (Union). IDT provides telecommunications services jointly with MetroCast, pursuant to a settlement agreement reached in Docket No. DT 06-169, approved by Order No. 24,727. Union is a small incumbent local exchange carrier (ILEC) operating in the towns of Alton, Barnstead, Center Barnstead, Farmington, Gilmanton, New Durham, and Strafford.

On March 3, 2009, pursuant to RSA 374:22-g and N.H. Code of Admin. Rules Puc 431.01, IDT was granted authority to operate as a CLEC in the Union service territory, conditioned on full compliance with the terms of the settlement agreement reached in DT 06-169. On March 6, 2009, Union filed a motion to rescind IDT's authority to operate in Union's

¹ Northern New England Telephone Operations LLC, d/b/a FairPoint Communications – NNE (FairPoint) serves more than 90 percent of the telephone customers in New Hampshire as a result of its acquisition of the Verizon landline business in New Hampshire.

service territory, further moving for a rehearing if IDT's authority is not rescinded. No response has been filed by IDT.

Union requests that the Commission rescind IDT's CLEC authorization in the Union service territory. Union argues that the Commission did not follow an appropriate procedure in granting IDT's request to expand its CLEC service territory. According to Union, the Commission is required by RSA 374:26, 374:22-g, 347:22-e, 541-A:31 and 541-A:35, as well as Commission rules, to provide notice to interested parties and an opportunity for hearing. Union claims that following a hearing the Commission must issue an order containing findings as required by RSA 363:17-b. Union asserts it did not receive notice of the Commission's approval of IDT's application and that the Commission failed to hold a hearing, make any findings, or issue an order regarding the application.

Union further claims that it was a mistake of law and fact for the Commission to utilize Puc 431.01 and the Puc Part 431 process to authorize IDT to operate in the Union service territory. Union maintains that Puc 431.01 only authorizes CLECs to operate in the service territories of non-exempt ILECs, and that it is an exempt ILEC pursuant to 47 U.S.C. §§ 153 (37) and 251 (f).

Union asserts that the Commission failed to notify the towns in Union's service territory of IDT's CLEC registration contrary to the requirements of RSA 541-A:39, I. Union also asserts that the application by IDT to expand into the Union service territory does not meet the requirements of 449.07(d), which specifies that "the applicant shall list 3 primary telecommunications services the applicant will offer in New Hampshire." The IDT application listed one service, and Union therefore asserts that the Commission is in error in granting CLEC

authority to IDT in the Union service territory. Finally, Union requests a rehearing of the Commission's decision to grant IDT CLEC authority in the Union service territory.

II. COMMISSION ANALYSIS

Similar to the arguments raised by Union in Docket No. DT 08-130, with respect to Metrocast Cablevision of New Hampshire,² this case calls into question the Commission's authority to act pursuant to RSA 374:22-g and Commission rules, Puc 431.01-431.02, to allow an existing cable provider to begin providing competitive telephone services within a small ILEC's service territory.

A. State and Federal Statutory Analysis

We begin by observing that the telecommunications landscape for small ILECs in New Hampshire is governed by the same federal statute that governs the largest ILEC. Both FairPoint and Union 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 essential distinction between small and large ILECs is that small ILECs³ are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union is not currently required to unbundle its network to CLECs in New Hampshire.

At the state level, due to recent legislative changes, large and small ILECs are treated the same for purposes of competitive entry into their service territories. Both are now governed by RSA 374:22-g, which provides that all telephone service territories will be nonexclusive. RSA 374:22-g further allows the Commission to authorize multiple telecommunications carriers in

² See Order No. 24,939 (February 6, 2009)

³ 47 U.S.C. § 153 (37) defines rural telephone as below 50,000 access lines or operating in areas with less concentrated populations.

any telephone service territory “to the extent consistent with federal law and notwithstanding any other provision of law to the contrary.” RSA 374:22-g, I (emphasis added).

We read RSA 374:22-g to grant us the discretion to permit competitive local exchange carriers to do business within the service territory of Union Telephone. We further conclude that RSA 374:22-g does not require a hearing in order to grant a CLEC application and, correspondingly, the necessary requirements of due process are satisfied by the procedures set forth in our rules. *See*, Puc Part 431. RSA 374:22-g instructs us to implement the section consistent with federal law and notwithstanding inconsistent state laws. RSA 374:22-g, enacted in 1995 and amended in 2008, deals specifically with telecommunications services. RSA 374:26, enacted in 1911 and amended in 1961, deals more generally with all types of utilities franchises. As a result, RSA 374:22-g is the more recent and more specific statute and should control in cases regarding telephone franchises. *See, Bel Air Associates v. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006).

State and national policies encourage competition in local telecommunications service. Policy makers have chosen to encourage that policy because they believe it leads to economic efficiency. The only thing that distinguishes this CLEC application from the numerous others we have approved through our streamlined registration process under Puc Part 431 is that in this case the ILEC whose service territory is being entered is subject to the rural exemption under the federal statute. *See*, 47 U.S.C. § 251 (f). We find no indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry. In fact, 47 U.S.C. § 251 (a) and (b) make clear that all local exchange carriers, regardless of size, must interconnect with other carriers operating in their service territory. The recent amendments to RSA 374:22-f and RSA 374:22-g make New Hampshire law consistent with federal law on this point. RSA

374:22-g treats all New Hampshire ILECs, whether large or small, equally concerning competitive entry.

The 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition. 47 U.S.C. § 253. In an effort to support the important policy goal of promoting competitive telecommunications markets and to comply with federal statutes, the Commission's CLEC registration rules provide for an administratively efficient process for competitors to enter the local telecommunications market. *See*, Puc 431.01.

We reject Union's claims that RSA 541-A:39 requires us to give notice to the municipalities in which IDT seeks CLEC authorization. RSA 541-A:39 is triggered by actions which directly affect the municipality. In this case, IDT's business partner MetroCast already provides cable service and operates cable plant in the municipalities where IDT proposes to provide telephone services. We do not find the provision of telephone service over existing cable plant to cause any direct effect on these municipalities.

We also reject Union's reliance on RSA 374:22-e for its contention that a hearing is required whenever the Commission considers an application for CLEC authorization. RSA 374:22-e became effective in 1990. At that time, telephone franchise areas served by a telephone utility that provided local exchange service were permitted to be wholly exclusive of other providers. Subsequently, in 1995, RSA 374:22-g became effective. RSA 374:22-g requires all such telephone utility franchise areas to be nonexclusive, notwithstanding any other provision of law to the contrary. With regard to the instant docket, we therefore find that RSA 374:22-g supersedes RSA 374:22-e.⁴

⁴ Because we find that neither RSA 374:22-e nor RSA 374:26 require notice and an opportunity for hearing in this docket, we are not persuaded by Union's argument that this matter constitutes a contested case pursuant to RSA 541-A:1, IV. Therefore, no final orders or findings are required pursuant to RSA 541-A:35. Any requirement for a final order pursuant to RSA 363:17-b is satisfied by the instant order.

B. Commission Rules and Rulemaking Authority

RSA 374:22-g, III provides the Commission with specific authority to promulgate rules to enforce the section and the Commission must act within the authority delegated to it by the legislature. *See, Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 689 (2008). When the Commission exercised the authority delegated to it by RSA 374:22-g and updated the rules in 2005, it balanced competing interests, 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. Puc Part 431 strikes an appropriate balance among these various interests regardless of whether the ILEC service territory is large or small.

Consistent with RSA 374:22-g, the current rules support competition, fairness and economic efficiency by allowing for an administratively efficient process to register a CLEC and by eliminating unnecessary barriers to CLEC entry into ILEC service territories. In cases where the ILEC's costs exceed those of an efficient competitor, the development of a competitive market may cause the ILEC to either lose customers, or find ways to reduce costs,⁵ but such a result is fully consistent with RSA 374:22-g. The carrier of last resort burden may be more expensive for small ILECs than for larger ILECs, but under the current federal statutory scheme, ILECs operating in high cost service areas are compensated for this obligation through the universal service fund (USF). *See*, 47 U.S.C. § 254. In fact, the ILEC at issue in this case, Union, received a total of approximately \$1.135 million in federal high cost support in 2007.⁶ In addition, ILECs can negotiate the price and terms of traffic exchange, as required by 47 U.S.C. §

⁵ 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.

⁶ FCC, Universal Service Monitoring Report, CC Docket No. 98-202, 2007, Table 3-30, at 3-134.

251 (b)(5), to recover the costs incurred to serve a CLEC. This provides an adequate vehicle for Union to recover expenses incurred to benefit competitive providers.

The fact that small ILECs had exclusive service territories under state law at the time the CLEC rules were last updated in 2005 does not mean those rules should not apply equally to large and small ILECs now that RSA 374:22-g has been amended. RSA 374:22-g makes no distinction between small and large ILECs. We find no sound policy reason to promulgate separate rules for small ILECs, nor has Union given any in its request to rescind our registration of IDT. The reference to non-exempt ILECs in Puc 431.01(d) does not prohibit registration of CLECs in exempt ILEC service territories. To interpret Puc 431.01(d) as such a prohibition would be contrary to our statutory directive in RSA 374:22-g and would also be inconsistent with federal law.

C. Completeness of IDT Application

Puc 449.07 specifies the format of the CLEC Application for Registration. In particular, Puc 449.07(d) states that the “applicant shall list 3 primary telecommunications services the applicant will offer in New Hampshire.” Union notes that the IDT application lists only a single service, “local exchange telephone service.” Consequently, Union argues, IDT has not submitted a proper application for the Commission to consider. Union, however, ignores both the attachments that IDT filed with its application, and the rate service schedule IDT filed on the same date. Attachment “A” to IDT’s application includes references to intraLATA toll service as well as local telecommunications service. Moreover, IDT’s rate service schedule lists multiple telecommunications services including, but not limited to, local service, intrastate long distance and interstate long distance services.⁷ The mere fact that these services were not listed

⁷ Section 1 of IDT’s rate service schedule also lists such services as voice mail, call trace and line blocking, all of which are services that satisfy the requirements of Puc 449.07(d).

on the lines provided in Section 3 of the application does not require denial of IDT's application. Given that the documents that IDT filed with the Commission satisfy the requirements of Puc 449.07(d), we find no basis for denying IDT's application.

D. Conclusion

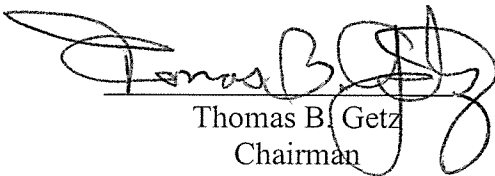
Consistent with the enabling legislation, RSA 374:22-g, as well as federal law, we have developed an administratively efficient process for CLEC registration to compete in ILEC service territories. We find Union's arguments concerning the process of registering IDT in its service territory unpersuasive, and we find IDT's application to comply with the requirements of Puc 449.07(d). We further conclude that IDT's expansion of service into the Union service territory will be for the public good.

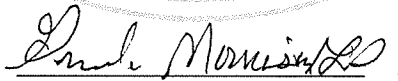
Based upon the foregoing, it is hereby

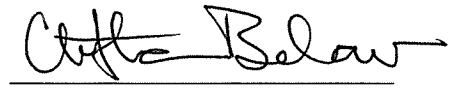
ORDERED, that Union's Motion to Rescind IDT's competitive local exchange carrier registration is **DENIED**; and it is

FURTHER ORDERED, that Union's Motion for Rehearing is **DENIED**.

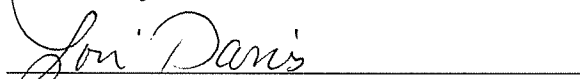
By order of the Public Utilities Commission of New Hampshire this twenty-second day of May, 2009.


Thomas B. Getz
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Graham J. Morrison
Commissioner


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Attested by:


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Docket #: 09-065

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