

## 1 STATE OF NEW HAMPSHIRE

## 2 PUBLIC UTILITIES COMMISSION

3  
4 September 2, 2010 - 10:06 a.m.  
5 Concord, New Hampshire

6 NHPUC SEP21'10 PM12:28

7 RE: DT 10-183  
8 RURAL TELEPHONE COMPANIES:  
9 CLEC Registrations within their Exchanges.  
10 (Prehearing conference)11 PRESENT: Chairman Thomas B. Getz, Presiding  
12 Commissioner Clifton C. Below  
13 Commissioner Amy L. Ignatius

14 Sandy Deno, Clerk

15 APPEARANCES: Reptg. Rural Telephone Company Petitioners:  
16 Harry N. Malone, Esq. (Devine, Millimet...)  
17 Reptg. New England Cable & Telecom. Assn.:  
18 Robert J. Munnelly, Jr., Esq. (Murtha Cullina)  
19 Reptg. segTEL:  
20 Jeremy Katz  
21 Reptg. PUC Staff:  
22 Matthew J. Fossum, Esq.  
23 Kate Bailey, Dir./Telecommunications Division  
24 Michael Ladam  
Jennifer Ducharme

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

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**STATEMENTS OF PRELIMINARY POSITION BY:**

Mr. Malone	4
Mr. Munnelly	7
Mr. Katz	9
Mr. Fossum	11



1 the Staff of the Commission. With me today are Kate  
2 Bailey, Michael Ladam, and Jennifer Ducharme from  
3 Commission Staff.

4 CHAIRMAN GETZ: Good morning. Okay.  
5 Well, let's address this first. Are there any objections  
6 to Petitions to Intervene?

7 MR. MALONE: No. No, Mr. Chairman.

8 CHAIRMAN GETZ: Okay. Well, then, let's  
9 take statements of positions. We'll begin with Mr.  
10 Malone.

11 MR. MALONE: Okay. Thank you, Mr.  
12 Chairman. This case is closely related to the one in the  
13 Commission's Docket Number DT 08-130, the ongoing  
14 proceeding involving Union Telephone Company's petition to  
15 rescind the CLEC authorization of MetroCast Cablevision of  
16 New Hampshire. In that docket, the Commission previously  
17 held that competitive local exchange carriers could  
18 register to provide service in the territories of rural  
19 local exchange carriers, notwithstanding its Rule Puc  
20 431.01, which restricts the registration process to the  
21 territories of non-exempt local exchange carriers, and RSA  
22 374:26, which requires a hearing for actions of this type.  
23 The Commission explained its decision by asserting that  
24 federal law and the recently enacted 374:22-g preempted or

1 superseded its registration rule and hearing requirement.

2 On appeal of this decision, the New  
3 Hampshire Supreme Court disagreed with the Commission and  
4 held that, in regard to market entry by CLECs into the  
5 territories of exempt LECs, state law required that the  
6 PUC must hold a hearing under RSA 374:26 and conduct a  
7 searching inquiry under RSA 374:22-g. However, this court  
8 also concluded that the Commission must, in the first  
9 instance, determine if the respective statutes were  
10 preempted by federal law, and it remanded this matter to  
11 the Commission for any further fact finding that may be  
12 required to resolve the question of whether federal law  
13 preempts the state law requirements of a hearing and an  
14 inquiry regarding the factors that must be considered in  
15 accordance with 374:22-g.

16 At the July 1st, 2010 prehearing  
17 conference for the remand phase of DT 08-130, the RLECs  
18 concluded their preliminary statement with a request that  
19 to the extent any CLEC that continues to solicit business  
20 in any service territory in which the Court has found its  
21 registration to be invalid, the Commission order them to  
22 cease and desist from further marketing activities until  
23 this matter has been resolved. Two weeks later, the rural  
24 local exchange carriers formalized this request in a

1 petition that is the subject of this proceeding, to  
2 declare null and void or rescind any CLEC authorization  
3 granted pursuant to a Form 10 registration, to engage in  
4 business as a telephone utility within the service  
5 territories of the RLECs. We feel that this is the only  
6 logical course, since the concerns that are codified in  
7 RSA 374:22-g are ever-present and continuing.  
8 Specifically, that statute requires, among other things,  
9 that "the commission shall consider the interests of  
10 competition with other factors including, but not limited  
11 to, fairness; economic efficiency; universal service;  
12 carrier of last resort obligations; and the incumbent  
13 utility's opportunity to realize a reasonable return on  
14 its investment."

15 CLEC activity in an RLEC's territory,  
16 particularly if the CLEC is acting as a proxy for a large,  
17 well financed cable company, impacts all of these factors,  
18 especially universal service, carrier of last resort  
19 obligations, and the opportunity for RLECs to realize a  
20 reasonable return on their investments. For these  
21 reasons, the public interest requires that, pending a  
22 final determination in DT 08-130. The CLECs' activities  
23 in RLEC territories be restricted until the CLECs file  
24 petitions in accordance with the Commission's rules that

1 are properly adjudicated in accordance with RSA 374:26.

2 Thank you.

3 CHAIRMAN GETZ: Thank you. Mr.  
4 Munnelly.

5 MR. MUNNELLY: Sure. Thank you. Thank  
6 you, your Honors. I agree that this case does flow out of  
7 the MetroCast/IDT case and the Supreme Court's decision on  
8 that. I think what's -- as I think counsel for the rural  
9 carriers has just stated, is that we are back, the Court  
10 has asked the Commission to build the record and determine  
11 whether the existence of the statutory notice and comment  
12 process constitutes an entry barrier that's precluded  
13 under 47 U.S.C. 253. NECTA believes that it is. And, the  
14 question really comes down to, "what's the way to build  
15 the record and to get a resolution from the Commission on  
16 this point?"

17 It seems that -- we'll leave to the  
18 technical session to discuss the detailed way to get that.  
19 It seems a lot of the case is pretty straightforward and  
20 could be subject to stipulation, in the sense of "what are  
21 the procedural rights of an RLEC that wants to -- that  
22 doesn't want to waive any of its rights?" In other words,  
23 they would have a right to -- there would be -- the  
24 process would be, you know, a Commission order of notice,

1 procedural conference that would lay the ground rules out  
2 and decide interventions. They would have the ability to  
3 offer evidence on all the 22-g factors. As counsel just  
4 noted, you know, they would presumably -- have the  
5 opportunity for discovery on that, there would be a  
6 hearing, there would be a, you know, a decision, and it  
7 would include, presumably, I think they noted that it  
8 should be a "findings of fact and law" under -- I can't  
9 remember what the exact statute, 363, or whatever it is  
10 under that. So, the process should be fairly  
11 straightforward, to lay out like what would the process  
12 be, and to make clear that that process would potentially  
13 apply with any CLEC application into a territory of a  
14 rural carrier.

15 So, beyond that, I think, then, for the  
16 most part, I think beyond that we're into the issue "does  
17 that context constitute an entry barrier in New  
18 Hampshire?" And, certainly, given some of the factors in  
19 22-g, including the impact on the rural's rate of return,  
20 those can be -- that would seem to envision the  
21 opportunity for a very broad, very lengthy, and very  
22 expensive proceeding that any CLEC would have to go  
23 through in order to enter a rural territory.

24 And that, in addition to the -- you

1 know, whatever it's going to take to get themselves an  
2 interconnection agreement or a traffic exchange agreement,  
3 which potentially could involve an entire nother  
4 proceeding in front of the Commission or detailed  
5 negotiations.

6 So, in a sense, to us it seems that this  
7 is a process that is destined to limit the ability of  
8 people to compete in New Hampshire's rural territories.  
9 We do see it as a significant entry barrier that amounts  
10 to a -- that should be prohibited by the Commission. And,  
11 we look forward to presenting that in this case.

12 CHAIRMAN GETZ: Okay. Thank you.

13 Mr. Katz.

14 MR. KATZ: SegTEL believes that the  
15 procedures envisioned by the rural telephone companies  
16 that would provide for substantial delay to competitive  
17 entry counts as a barrier to entry that is preempted by  
18 Section 253 of the Telecommunications Act. And, we  
19 furthermore believe that this is the threshold issue that  
20 has to be evaluated first and the issue that was remanded  
21 by the Supreme Court.

22 Second to that, though, in the Rurals'  
23 statement of position, they also appear to be asking for a  
24 truly extraordinary remedy, which is a revocation of

1 authorities that have been granted well over a year ago at  
2 this point during the pendency of this proceeding. That's  
3 a truly extraordinary remedy, the revocation of authority.

4 SegTEL has authority to operate in all  
5 these territories, and has had this authority for what  
6 will be 18 months next week. There's been no harm that's  
7 been alleged in this petition. There has been no harm  
8 experienced, no prospective harm. And, for relief that  
9 substantially amounts to an injunctive relief, there is  
10 just no way that this petition could ever meet the test  
11 for any sort of interim suspension or revocation.

12 So, in addition to our position on  
13 federal preemption, we oppose any interim relief on the  
14 basis that there's really no basis to provide it. Thank  
15 you.

16 CHAIRMAN GETZ: Okay. And, I don't see  
17 in the file a Petition to Intervene. Did you submit one  
18 or are you making that petition orally today or --

19 MR. KATZ: My understanding is we were  
20 made a mandatory party.

21 CHAIRMAN GETZ: Okay. I'm just looking  
22 for that, and I didn't see that language. Okay. Well,  
23 let's -- whichever way that is addressed, --

24 MR. KATZ: We'll be glad to file an

1 intervention.

2 CHAIRMAN GETZ: Thank you. Mr. Fossum.

3 MR. FOSSUM: Thank you. I'll first just  
4 address the last issue that you raised. In the order of  
5 notice for this particular docket, one of the ordering  
6 clauses informed the Petitioners that they were to notify  
7 a series of CLECs who had all been granted this statewide  
8 authority that's at issue in the docket, including segTEL.  
9 I don't read that as making any of those CLECs "mandatory"  
10 parties. And, in fact, filed just yesterday, if I  
11 understand, was a notation from Staff that Light Tower  
12 Fiber, which had been one of these statewide certified  
13 CLECs, has opted to withdraw that authorization, rather  
14 than continue it on a statewide basis. And, it has  
15 submitted a petition or a request for a new authorization  
16 only in the territory of FairPoint Communications. So, I  
17 guess that would go to the issue of whether those were  
18 intended to be mandatory parties or not.

19 That all said, little has changed in  
20 Staff's positions in the two months since we had the last  
21 prehearing conference on this issue, in the -- at then  
22 combined dockets of 08-130, 09-065, and 09-198; 09-198 has  
23 since been dismissed. It is Staff's intent to work with  
24 the parties who clearly represent the varying sides of

1 these issues, to build a complete and accurate record for  
2 the Commission to make its decision on the preemption  
3 issue that has been remanded by the Supreme Court. And,  
4 at this time, Staff does not have its own position on the  
5 issue.

6 That said, I did want to raise that, on  
7 July -- or, I'm sorry, earlier, I forget the exact date, I  
8 apologize, but now docketed as DT 10-213 by the Commission  
9 is the petition by CRC Communications to be registered as  
10 a CLEC in the territory of Northland Telephone of Maine,  
11 which, though a subsidiary of FairPoint Communications, is  
12 treated in the same way as the Rural ILEC Petitioners  
13 here. Staff has submitted a recommended process for  
14 addressing that application. The Commission has not  
15 adopted, rejected or ruled in any way on Staff's  
16 recommendation at this time, but I did want to acknowledge  
17 that that petition exists, and that Staff has recommended  
18 a process for that.

19 I also did want to make particularly  
20 clear that the process recommended by Staff in that  
21 petition and for processing that docket is intended only  
22 to address the processing of that docket, and it is not  
23 intended to reflect Staff's position relative to  
24 preemption or relative to the manner in which similar

1 petitions should be handled in a general manner.

2 And, with that, Staff looks forward to  
3 working with the parties on this matter and resolving it  
4 hopefully fairly efficiently. Thank you.

5 CMSR. IGNATIUS: I guess I have a  
6 question, and Staff or others may not know this. It  
7 relates to whether those authorized entities should be  
8 required to cease operation. Of the four that are  
9 remaining that Staff has identified as having statewide  
10 authorization, are you aware of their status, whether they  
11 have customers, whether they are truly operating? I think  
12 we can all agree segTEL is. But are the other three, does  
13 anyone know?

14 MR. FOSSUM: We do not know at this time  
15 where exactly they're operating, no.

16 CMSR. IGNATIUS: Would you be willing to  
17 -- and does anyone else have an answer to that?

18 MR. STAFFORD: I don't.

19 CMSR. IGNATIUS: If Staff could take a  
20 look at that and submit something, a memo to the record  
21 for everyone to review, just -- because I think that is  
22 important to know whether it's a theoretical question or  
23 an acutal question, when we talk about "ceasing  
24 operations".

1 MR. FOSSUM: We will endeavor to do  
2 that.

3 CMSR. IGNATIUS: Thank you.

4 CHAIRMAN GETZ: Okay. Is there anything  
5 else we need to address this morning then?

6 (No verbal response)

7 CHAIRMAN GETZ: Okay. Hearing nothing,  
8 then we will close the prehearing conference, await a  
9 recommendation, hopefully, a joint recommendation from the  
10 parties on how to conduct the remainder of this  
11 proceeding. And, we'll take the matter under advisement.  
12 Thank you, everyone.

13 **(Whereupon the prehearing conference**  
14 **ended at 10:22 a.m. and a technical**  
15 **session was held thereafter.)**

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