

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

RE: Comcast Phone of New Hampshire, LLC)
Request for Authority) Docket No. DT 08-013

**INITIAL BRIEF

OF

UNION TELEPHONE COMPANY**

June 25, 2008

Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, NJ 07090
Phone: (908) 301-1211
Fax: (908) 301-1212
e-mail: mcrothfelder@rothfelderstern.com
ATTORNEYS FOR UNION TELEPHONE
COMPANY

INTRODUCTION AND SUMMARY

Union Telephone Company d/b/a Union Communications (“Union”) is an intervenor in this docket. Union is a small Incumbent Local Exchange Carrier (“ILEC”) with less than 25,000 access lines. Union is active herein due to concern over the reasonable and lawful treatment of such small ILECs and the potentially precedent setting nature of this case. In this brief, Union respectfully submits that the evidence in this case is not sufficient to grant the authority requested, that the Commission currently lacks the statutory jurisdiction to grant the authority requested in this case and that, in this circumstance, federal preemption may not properly be applied by the Commission to provide that authority.

BACKGROUND

As described in the Commissions Order in this docket of May 2, 2008, this case involves the petition by Comcast Phone of New Hampshire (“Comcast” or “Petitioner”) for authority to provide local telecommunications services in the service territories of three different ILECs – each of which has less than 25,000 access lines. The Commission initially granted this petition via Order *nisi* dated April 4, 2008, but suspended said order via its Order dated May 2, 2008. These basic facts of the petition, as described by the Commission’s May 2, 2008 Order, are supplemented by the Stipulation of Facts submitted by the parties under a Commission Staff letter dated June 18, 2008.

The Commission was created by New Hampshire statute. 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 for or in any way modify the statutory law. See *Kimball, supra*.

The application for a competitive telephone utility authority, which Comcast seeks in this docket, is governed by RSA 374:22-f.¹ RSA 374:22-f expressly denies the Commission authority to allow a telephone utility to provide service in a geographic area where another telephone utility has less than 25,000 access lines unless the existing telephone utility requests such action. RSA 374:22-f also requires the Commission to consider the statutory criteria provided by RSA 374:24-e and 374:24-g prior to granting any such authority.

RSA 374:24-e requires the Commission to consider the six issues – five specific ones and “all other relevant factors” involved in the specification of service areas. RSA 374:24-g requires the Commission to consider the following additional seven issues:

the interests of competition; fairness; economic efficiency; universal service; carrier of last resort obligations; the incumbent utilities opportunity to realize a reasonable return on its investment; and the recovery from incumbent providers the of expenses incurred by the competitive taking into account the proportionate savings or benefit or savings, if any, by the incumbent as a result of incurring such expenses.

¹ The exact language of RSA 374:22-f is as follows:

A telephone utility shall not construct or extend its facilities in order to furnish, or otherwise furnish or offer to furnish, its service to premises within the service territory of another telephone utility that provides local exchange service and that has fewer than 25,000 access lines, except when requested by the utility in the territory of which the premises are located and when the commission, upon petition, finds and determines that the service proposed to be rendered will be consistent with the criteria set forth in RSA 374:22e and RSA 374:22g.

ARGUMENT

I. THE APPLICABLE NEW HAMPSHIRE STATUTES DO NOT AUTHORIZE THE COMMISSION TO GRANT THIS AUTHORITY

In the case at hand, there is no dispute that Comcast's request for authority to provide telecommunications services is in geographic areas served by existing telephone utilities with less than 25,000 access lines. There is no evidence that the existing telephone utilities have requested Comcast to provide service. Under these facts, the New Hampshire statutes do not confer to the Commission the jurisdiction or power to grant Comcast the requested authority.

II. THE LACK OF EVIDENCE ON CRITERIA THE COMMISSION IS REQUIRED TO CONSIDER REQUIRES THE COMMISSION TO DENY THE REQUESTED AUTHORITY

The Commission's Orders of April 4, 2008 and May 2, 2008 in this docket states that federal law preempts the "exclusivity" provisions of RSA 374:22-f. The Orders do not claim that the matters that RSA 374:22-g requires the Commission to consider are preempted. For example, the Commission has not held that federal preemption keeps it from considering how the grant of such authority would impact: universal service, carrier of last resort obligations or the incumbent utilities opportunity to realize a reasonable return on its investment. The statute requires these issues to be considered and addressed in this proceeding. These are the types of issues that are very important to Union and presumably other small ILECs.

Despite the clear requirements to consider these issues, there is no evidence on several of these issues, such as the ones listed immediately above, before the Commission. Petitioner, although having the burden of proof under Commission rule

PUC 203.05, did not to provide evidence on these issues through a hearing process. The Stipulation of Facts, which Petitioner agreed to, also provides no evidence on these issues. Thus, it is impossible for the Commission to consider and address these issues, as required by statute. For this reason, the Commission may not, under the statutes and on this record, grant the requested authority.

III. THE COMMISSION MAY NOT USE FEDERAL PREEMPTION TO EXTEND ITS STATUTORY AUTHORITY

Union also respectfully submits that the PUC lacks authority use federal statutes to extend its powers beyond those conferred by the New Hampshire statutes. Here, the potential action is granting competitive authority in a geographic area -- an area served by an ILEC with less than 25,000 access lines where the ILEC has not requested the service. The legislature has not granted the Commission such jurisdiction. Providing a remedy beyond the bounds of the Commission's statutes is the province of a Court of Law or the Legislature -- not the Commission.

The Commission has been upheld declining to act on existing statutes based upon federal preemption. *See In Re Conservation Law Foundation*. 147 N.H. 89 (2001). However, there is no basis in law for the Commission to extend its jurisdiction and take action explicitly denied by state statutes.

IV. FEDERAL PREEMPTION DOES NOT APPLY BECAUSE THERE ARE OTHER AVENUES TO OBTAIN AUTHORITY

Union further notes that the federal law that the Commission relied on for its finding on federal preemption in the May 2, 2008 Order -- 47 U.S.C. § 253(a) -- prohibits *the state* from taking certain actions that restrict a competitive entity from providing service. The law does not explicitly require the Commission to provide such authority.

Thus, although the Commission is restricted by statute from providing the type of authority requested, Petitioner can request such authority from the legislature.

The legislature has granted public utilities and other companies franchises to operate in the past. *See e.g. Lorenz v. Sterns*, 85 N.H. 494 (1932) (Court discusses legislative grant of franchise for bridge, water and sewer system.); *Re Tilton and Northfield Aqueduct Company, Inc.* 90 NHPUC 599, Order No. 24,562 (December 9, 2005)(Commission notes the legislative grant of franchise to Tilton and Northfield Aqueduct Company, Inc. for water utility by the legislature – a utility currently regulated by this Commission). Petitioner can and should request such a franchise from the legislature before there is a reasonable claim of federal preemption.

CONCLUSION

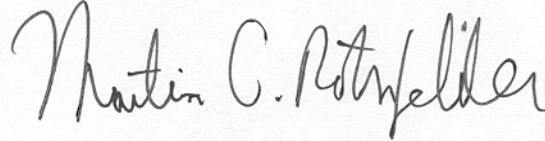
This case involves a request for authority to provide telecommunications services in geographic areas already served by ILECs that have less than 25,000 access lines. Under RSA 374:22-f, the Commission may grant such authority only if such ILECs have requested service by the competitive entity and only after it addresses a series of issues enumerated in the statute. There is no evidence that the ILECs requested the Petitioner to serve in their areas and no evidence on several of the issues the Commission must consider prior to granting such authority. Thus, the Commission must deny the petition.

Federal preemption also provides no basis to grant the authority. Consideration of federal preemption is premature because the Petitioner has other options to obtain the requested authority. Federal preemption, if it exists, does not empower the Commission to extend its statutory jurisdiction to grant the authority.²

² Union further notes that new legislation, SB 386, which has passed the legislature, but at the time of this writing had not been signed by the Governor, according to the New Hampshire Legislature's

Respectfully submitted,

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

A handwritten signature in black ink that reads "Martin C. Rothfelder". The signature is written in a cursive style and is positioned above a horizontal line.

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

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website, may change aspects of the law involving the PUC granting competitive authority to a telephone utility in the future. That bill has no impact on this case.