STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Petition by Certain Rural Telephone Companies Regarding CLEC Registrations within Their Exchanges	)))	Docket No. DT 10-183

REPLY BRIEF OF NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

Introduction

The New England Cable and Telecommunications Association, Inc. ("NECTA") submitted its February 11, 2011 Initial Brief ("NECTA Brief") that offered legal argument and record evidence regarding the important issues before the Public Utilities Commission ("PUC" or "Commission"). The NECTA Brief explained that the required multi-factor adjudicative hearing process for each competitive local exchange carrier ("CLEC") request to enter each rural territory under RSA 374:26 and RSA 374:22-g, as interpreted by the New Hampshire Supreme Court in Appeal of Union Telephone Company d/b/a Union Communications, 160 N.H. 309 (May 20, 2010) ("Union Appeal"), constitutes a barrier to entry that plainly violates 47 U.S.C. § 253.

The Petitioning RLECs[1] and segTel, Inc. ("segTel") also filed February 11, 2011 Initial Briefs ("RLEC Brief" and "segTel Brief," respectively). The segTel Brief represents an excellent compilation of factual and legal arguments supporting § 253 preemption from the perspective of a non-cable-affiliated CLEC

[1] The Petitioning RLECs are: Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc. and Granite State Telephone Company, Inc.

which NECTA commends to the Commission's attention. In contrast, the RLEC Brief opposes preemption of the state law adjudicative hearing requirement using a variety of unsupported, flawed and unpersuasive arguments. NECTA replies as follows to the RLEC Brief.[2]

Argument

I. THE RLEC BRIEF MISSTATES STANDARDS FOR FEDERAL PREEMPTION OF STATE COMPETITIVE ENTRY REQUIREMENTS.

A. Introduction

Key legal standards applicable to federal preemption of state law requirements that affect competitive telecommunications entry under 47 U.S.C. § 253, as endorsed in the Union Appeal, are summarized in the NECTA Brief at pp. 4-5. The RLEC Brief misstates these standards in its effort to avoid preemption of the RSA 374:22-g and RSA 374:26 adjudicative hearing requirement. For the reasons detailed below, the Commission should apply the standards correctly and, in so doing, preempt RSA 374:22-g and RSA 374:26 as applied to the CLEC entry process in rural areas.

B. Section 253(a)

The RLEC Brief first misstates the standards for interpreting the general preemption rule in subsection (a) of 47 U.S.C. § 253. Section 253(a) bars all state and local requirements that "may prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. 47 U.S.C.

[2] This Reply Brief is not intended to comprehensively address arguments raised by other parties or reiterate arguments otherwise presented. NECTA's failure to address any issue raised in any brief does not mean that NECTA agrees with or adopts such a position or argument; NECTA does not waive any of its rights with respect to any such argument or position.

§ 253(a) (emphasis added). The Union Appeal construes the above text to require that a state or local requirement is subject to invalidation if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal or regulatory environment," (emphasis added). See Union Appeal, 160 N.H. at 321 (citing Puerto Rico v. Municipality of Guayanilla, 450 F. 3d 9, 18 (1st Cir. 2006) (citing TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002) (quoting Cal. Payphone Ass'n, 12 F.C.C.R. 14191 (1997)))). The Union Appeal also endorses the Guayanilla clarification that "[a] prohibition does not need to be complete or insurmountable to run afoul of 253(a)." See id. (citing Guayanilla at 18). With these standards in mind, several arguments in the RLEC Briefs should be rejected as inconsistent with the applicable legal standards supra.

First, while the "materially inhibits or limits" standard in the Union Appeal is acknowledged in the RLEC Brief at p. 4, the RLECs improperly advise the Commission that preemption requires proof of a "prohibition." See, e.g., RLEC Brief (1) at p. 3, asserting that a state-imposed entry requirement is valid unless it "rises to such a level that it is effectively an outright prohibition"; (2) at id., referring a second time to "an outright prohibition against entry"; and (3) at 4, entitling the Section III Argument as "RSA 374:22-g is Not a Prohibition Under 253(a)," (emphasis added). The RLECs even go so far as to state that local regulations are not preempted if "we can imagine any effective process in which it is not a prohibition." The RLECs cite to no authority for these excessively narrow interpretations. RLEC Brief at p. 3. The Commission should decide this

proceeding based on the proper standard of whether RSA 374:22-g and RSA 374:26 collectively impose a legal requirement that "materially inhibits or limits" the ability of CLECs to enter New Hampshire rural areas.

Additionally, the RLEC Brief focuses almost exclusively on the voice entry issues associated with NECTA member cable companies and repeatedly refers to cable-specific factual issues to support the adjudicative hearing requirement and argue against preemption.[3] These arguments are inconsistent with the requirement that the preemption be judged relative to the ability of "any competitor or potential competitor to compete in a fair and balanced legal or regulatory environment" in New Hampshire's rural areas. Union Appeal, 160 N.H. at 321 (emphasis added). The Commission must consider the potential entry barrier issues as applied to segTel, small and mid-sized cable companies, and other facilities-based business or residential CLECs. The excessively burdensome RSA 374:22-g and RSA 374:26 CLEC entry process could cause any of these potential competitors to avoid or abandon their entry efforts, in addition to causing NECTA members to do so.

C. Sections 253(b) and (f)

The RLEC Brief (at pp. 4-6) also seeks an unsupported expansion of the scope of state law reservations in 47 U.S.C. § 253(b) ("State Regulatory Authority") and § 253(f) ("Rural Markets"). Section 253(b) provides that § 253

[3] RLEC Brief at p. 4 (asserting that CLECs must provide evidence that they are materially hampered, referencing a NECTA data response listing its New Hampshire members and referring to some of them as being among the "biggest communications companies in the country"); id. at p. 10 (contrasting segTel entry estimates of 12-18 months with segTel's statement that cable companies can "turn up telephone service `relatively quickly'"); id. at p.11 (discussing the portion of Dr. Pelcovits testimony relative to cable companies); id. at pp. 11-15 (seeking to address Dr. Pelcovits' analysis re potential operating profits in rural areas by comparison to various cable-specific industry information).

does not affect the ability of a state to impose competitively neutral requirements relative to universal service, public safety and welfare, telecommunications service quality and consumer rights and § 253(f) reserves a state's ability to impose on CLECs Eligible Telecommunications Carrier ("ETC") obligations prior to commencing service in rural areas. NECTA does not contest that longstanding Federal Communications Commission ("FCC") case law holds that if a particular state law requirement complies with § 253(b) or § 253(f), it cannot be subject to § 253(a) preemption. See RLEC Brief at p. 5 and n. 6; compare, e.g., Rebuttal Testimony of Michael D. Pelcovits for NECTA ("NECTA Rebuttal Testimony"), at pp. 11-12 (acknowledging that rural entry may raise telecommunications policy issues but requesting that they be addressed in forums other than the CLEC entry process).

The RLEC Brief departs from these well established standards when it argues that § 253(b) and § 253(f) are consistent with a no preemption finding relative to the RSA 374:22-g and RSA 374:26 multi-factor adjudicative hearing requirement for entry into rural areas. RLEC Brief at pp. 5-6. The RLECs' misinterpretation of the scope of these two limited state law reservations is unpersuasive and should be rejected for some or all of the following reasons.

First, the claim that many of the concerns reserved in 47 U.S.C. § 253(b) "are included in the criteria...for determining the public good under RSA 374:22-g" (RLEC Brief at p. 5) (emphasis added) ignores that the most burdensome requirement at the center of this investigation – the impact of entry on the affected RLEC's rate of return – is not "included." Accordingly, state laws that

give rights to an incumbent to force each and every competitive entrant to prosecute rate case-like proceedings, at a cost of tens or even hundreds of thousands of dollars, in order to secure CLEC status are not reserved for protection in § 253(b). See Direct Testimony of Michael D. Pelcovits ("NECTA Initial Testimony") (NECTA Rebuttal Testimony and NECTA Initial Testimony, collectively hereinafter "Pelcovits Testimony") at pp. 21-24. Indeed, all of the reserved 47 U.S.C. §§ 253(b) and (f) factors address the potential impacts of telecommunications services competition on consumers and the public interest without any mention of the potential extent of adverse economic impacts on private incumbents. Neither of these statutes requires that the interests of incumbent RLECs be taken into account in market entry issues as a matter of "fairness and balance," as the RLECs allege. See RLEC Brief at pp. 4-5.

Second, the RLECs ignore that 47 U.S.C. §§ 253(b) and (f) do not grant a state untrammeled discretion to decide the procedural format by which reserved rights are put into practice. No statutory text or precedent assures the state the ability to implement some or all of the reserved federal rights – plus additional state-specific rights – through a burdensome, costly and anti-competitive mechanism of case by case CLEC entry request adjudication. Rather, the § 253(b) requirement that implementation of these reserved rights occur "on a competitively neutral basis" supports, and likely requires, implementation of reserved rights through efficient and cost-effective rulemaking or generic proceedings. If the Legislature or Commission seek to advance policy

objectives, they can do so in many forums other than the CLEC entry process. See NECTA Rebuttal Testimony at p. 12; NECTA Brief at p. 21.

Finally, RLECs ignore that 47 U.S.C. § 253(b) only permits "requirements necessary" to vindicate the specified policy factors. Id. In order to invoke this provision, the Commission would have to conclude that it is "necessary" to pursue all of these policies through a case by case adjudicative proceeding for each CLEC entry request. Absent any necessity showing, and there is none offered in the record or in the RLEC Brief, § 253(b) is not available to circumvent a § 253(a) preemption finding.

II. THE RLECS FAIL TO ESTABLISH THAT THE CLEC ENTRY PROCEDURES ARE REASONABLE OR COMPARABLE TO OTHER STATES.

The RLEC Brief (at pp. 6-7) summarizes the multi-step adjudicative procedures that will apply to each CLEC entry request in each RLEC service territory, unless waived by all parties (including the affected RLEC). It omits mention of the half-dozen factors RSA 374:22-g directs the Commission to consider in such proceeding, including the assessment of impacts of entry upon the affected RLEC's rate of return. The rate of return condition potentially requires a rate case-like proceeding if the RLEC introduces evidence on that point. See NECTA Initial Testimony at pp. 21-24.

The RLECs on brief continue to argue that the New Hampshire adjudicative hearing requirements are similar to those in other jurisdictions and thus do not merit preemption. See RLEC Brief at Section IV; see also RLEC Initial Testimony at pp. 7-11 (discussing various entry-related provisions in 15

states). These arguments were discussed and comprehensively rebutted in the Pelcovits Testimony and NECTA Brief. The Commission should give little or no credence to the RLECs' tactic of identifying individual allegedly comparable requirements in a dozen-plus states without any attempt to analyze how these requirements are implemented in practice. See NECTA Rebuttal Testimony at pp. 5-7. In fact, as far as NECTA can see, all of the state commissions cited by Mr. Meredith operate relatively streamlined CLEC entry regimes that do not pose burden or delay issues anywhere near those established in the record of this proceeding. Id. As the RLECs acknowledge, no other state has a counterpart to the problematic RSA 374:22-g requirement that the Commission adjudicate impacts of a CLEC's entry on the incumbent's rate of return in determining the public good. Direct Testimony of Douglas Meredith at p. 11.

The RLECs separately point to the relative absence of FCC cases preempting state or local rules involving CLEC entry unless they involved "an express ban on CLEC entry, or vested veto power in the hands of an ILEC." RLEC Brief at pp. 9-10. This argument does not stand up to scrutiny for multiple reasons. Once again, the RLEC argument seeks to circumvent the § 253(a) legal standard that does not require bans or veto power to justify preemption. See Section I.A. supra. Simply put, the fact that there is case law invalidating prohibitions and ILEC vetoes does not mean that those are the only grounds for invalidation. Moreover, the RLECs conveniently ignore a state decision that invalidated a state requirement of an adjudicative hearing for CLEC entry.

Compare RLEC Brief at pp. 8-9 with NECTA Brief at p. 5 n. 4 (discussing Sprint ruling by Wisconsin PUC).

Finally, RLECs conclude their state law comparisons argument by raising general concerns about possible adverse impacts to RLECs associated with carrier of last resort obligations and high cost versus low cost areas within an RLEC service area. RLEC Brief at pp. 9-10. These arguments have no apparent connection with the putative topic of entry requirements in other states. Moreover, any such valid policy concerns can and lawfully should be addressed in forums other than via case-by-case adjudication of each CLEC's request to serve each RLEC territory in New Hampshire. See Section I.B supra.

III. CLAIMS THAT APPLICATION COSTS ARE NOT "PROHIBITIVE" COMPARED TO OTHER MARKET ENTRY COSTS" ARE LEGALLY AND FACTUALLY FLAWED.

The RLEC Brief (at pp. 10-15) closes with an argument section offering scattershot factual arguments seeking to diminish the costs and delays associated with compliance with the RSA 374:22-g and RSA 374:26 adjudicative hearing process for each CLEC entry request. These arguments should be viewed skeptically, as the record reflects a poor likelihood of competition in New Hampshire's rural areas absent preemption – namely, rural territories with limited profit potential for competitive providers of all sizes combined with the usual market entry and marketing costs in addition to a burdensome and time consuming adjudicative hearing hurdle to become authorized for entry is not an attractive business opportunity for competitive providers. See generally NECTA Brief at Section III. The RLECs' arguments seeking to get around these evident

impediments are unsupported, logically flawed and, once again, riven with the misapplications of applicable 47 U.S.C. § 253 legal standards.

The first RLEC argument, made in the argument heading, is that certain costs are or are not "prohibitive." See RLEC Brief at p. 10. However, as discussed in Section I supra, and not repeated here, a state-mandated requirement does not have to be "prohibitive" to be preempted. Rather, it only has to "materially inhibit[ ] or limit[ ]" competition. See Section I supra.

Second, the RLECs attempt to discredit Pelcovits Testimony by comparing the testimony of Dr. Pelcovits from a prior proceeding to the RLECs interpretation of his testimony in this proceeding. The RLECs quote from the Pelcovits Testimony in which Dr. Pelcovits states, " . . . given the combination of the potentially burdensome adjudicative hearing requirement on each entry application and other service related investment costs, the potential for successful profitable entry is far from assured in these markets." RLEC Brief at p. 11 and NECTA Initial Testimony at p. 18. The RLECs' interpretation is that "[Dr. Pelcovits] strongly implied that the cost of a commission proceeding would be so high compared to all other market entry costs that it could result in a decision not to move forward." RLEC Brief at p. 11. The record is void of any Pelcovits Testimony or NECTA argument asserting that Commission proceedings are "so high compared to all other market entry costs..." Id. Dr. Pelcovits and NECTA have at every point in this proceeding explained that the costs of a hearing requirement "combined" with other high market entry costs are

burdensomely excessive, especially given the limited profit potential in New Hampshire's rural areas.[4]

Third and finally, the RLECs devote the rest of their argument (pp. 11-15) to challenging Dr. Pelcovits' estimates of the profit potential in each of the approximately dozen New Hampshire rural areas. RLEC Brief at pp. 11-15; see NECTA Initial Testimony at 19-27 (discussing analysis). These criticisms are themselves seriously flawed. The analysis in the Pelcovits Testimony adds some factual support for the common sense conclusions that profit potential is limited in all of New Hampshire's rural areas, and severely limited in the smallest of areas, and that substantial costs associated with market entry are likely to have a material adverse impact on competition. The RLECs' unsound criticisms of this analysis include the following:

- The RLECs criticize the $82,575 estimate in a 1,000 customer RLEC system, and argue the resulting $82.58 discounted figure per potential

[4] The RLECs apparently admit that non-application costs in rural areas are very high. This follows from their confusing claim (at pp. 10-11) of an inconsistency between Dr. Pelcovits' 2007 testimony in an unnamed docket (actually, the Verizon-FairPoint docket, case no. 07-011) and his current testimony. The RLECs accurately reproduce portions of Dr. Pelcovits' testimony in 07-011 that "prohibitively expensive" outside plant construction costs were "the main reason" competition has been slow to develop in many areas." They then accurately reproduce portions of Dr. Pelcovits' Initial Testimony that the combination of high "service-related investment costs" (the same costs as outlined in 2007) and additional costs of entry (identified as including costs of obtaining "interconnection or traffic exchange rights from the RLEC or other carriers," "marketing to publicize its new services," and "the potentially burdensome adjudicative hearing requirement on each entry application") mean that "successful profitable entry is far from assured in [rural] markets." The claimed inconsistency apparently is a belief, not supported in the text (RLECs state it is only "strongly implied" by him), that Dr. Pelcovits has taken conflicting positions regarding the comparative size of outside plant costs versus application-related costs. See RLEC Brief at p. 11. There is no inconsistency and the RLECs miss the point of Dr. Pelcovits' testimony that given (1) relatively low profit potential in rural areas, and (2) relatively high outside plant and other costs, the size of what the RLEC's call "application-related" costs are critically important to determining whether competition ever will flourish in rural areas. Moreover, even over the last several years some firms (e.g., cable companies) have overcome the barrier of having to build or customize outside plant to provide voice service, this does not mean that the other barriers to entry, including the application-related costs, are not large enough to make entry unprofitable.

customer is too low to be reasonable. RLEC Brief at pp. 11-12. This criticism of this estimate as unreasonable reflects very significant misstatements of Dr. Pelcovits' analysis. For example, the $82,575 figure is not an estimate of the present value of total revenues in a 1,000 customer RLEC territory (as claimed by the RLECs) but, instead, represents the present value of net revenues after deducting for the very substantial operating costs of providing voice service. Understandably, in light of the proper interpretation of the Pelcovits Testimony, the potential profits for a CLEC will be very low in a 1,000 customer RLEC system and, as discussed in other tables, will be negative in several of the smallest New Hampshire RLEC territories after accounting for the sunk costs of entering the market.

- The same passage in the RLEC Brief incorrectly claims that the $82,575 estimate reflects revenues from "1,000 potential customers." The RLECs miss the point that the NECTA chart reflects discounted net revenues only from a projected percentage of the market that a CLEC is likely to obtain. Here, Dr. Pelcovits projects that the portion of the 1,000 customer RLEC system that will be obtained by the CLEC will start low and rise to 25% by ten years after entry, and the discounted revenue analysis reflects these projected market shares.[5]

- The RLEC's dismissal of the profit potential analysis (RLEC Brief at p. 12) as based on a mere "FCC paper" misses the point, highlighted by Dr.

[5] The FCC figure of 24% penetration in New Hampshire for cable providers (i.e., voice with bundled Internet) nearly 13 years after passage of the 1996 Telecommunications Act – cited by the RLEC Brief at p. 14 n. 25 – appears to validate Dr. Pelcovits' 25% estimate as of ten years after market entry.

Pelcovits in the NECTA Initial Testimony at p. 19, that he used an FCC analytical model designed for the purposes of determining forward looking economics of providing broadband-based services in rural areas."[6] It is hard to imagine a better model for use in assisting the Commission with its inquiry regarding New Hampshire's rural areas. Consequently, the input figures relating to average revenues per customer, discount rates, margin, and the like – all claimed by the RLECs without supporting citation as being "of questionable veracity" – come directly from the parameters of the FCC model.

- Finally, the RLECs offer revenue figures from a Securities and Exchange Commission Form 10-Q disclosure for Comcast and an investment firm report on cable voice opportunities in business markets that NECTA furnished as part of one of its discovery responses concerning one factual matter to argue that Dr. Pelcovits' profit figures are potentially understated. RLEC Brief at pp. 12-15. The RLECs disingenuously ignore that these figures focus on the two largest cable companies (Comcast and Time Warner) rather than smaller cable operators in New Hampshire or potential CLEC entrants (such as segTel) and represent the national results of Comcast's and Time Warner's predominantly urban and suburban broadband properties rather than the rural-focused inputs in the FCC model used by Dr. Pelcovits. At a more fundamental level, the RLECs' critique of Dr. Pelcovits' analysis is flawed because it takes inputs out of context and ignores that the financial ratios from one set of reports

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6 See FCC Broadband Assessment Model, Model Documentation (2010) available at <http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-working-reports-series-technical-paper-broadband-assessment-model.pdf> (last reviewed on February 21, 2011).

may be measuring something different from seemingly similar sounding financial ratios used by another analyst (in this case by Dr. Pelcovits). Had the RLECs wanted to show that the financial case for entry was much stronger and the barriers to entry lower than claimed by NECTA, they could have provided their own complete model of the market. The RLECs' unsound and unsupported use of these public investor-oriented documents to challenge the results of Dr. Pelcovits' use of the FCC rural model are unreasonable and should be rejected.

Conclusion

For the reasons stated in NECTA's Initial Brief and herein, the record shows that the reduced profit potential of rural territories in New Hampshire, coupled with an adjudicative hearing process permitting evidence on the affected RLEC's own rate of return, creates a "very high likelihood that the envisioned adjudicative process could become a significant barrier to entry into the rural exchanges of New Hampshire...especially when considered in conjunction with other entry-related sunk costs." NECTA Initial Testimony, p. 30. Furthermore, compelling pro-competition and pro-consumer policy grounds support elimination of this requirement. Finally, even if some of the factors in RSA 374:22-g may be permissible subjects of state regulation under 47 U.S.C. §§ 253(b) and (f), the RLECs have not shown that it is "necessary" to enforce these factors through an anti-competitive and burdensome adjudicative hearing process applicable to each CLEC entry request in each RLEC territory in New Hampshire.

Accordingly, based on these facts and analysis and the 47 U.S.C. § 253 legal standards, the Commission should find and rule that the adjudicative hearing process in RSA 374:22-g, RSA 374:26 and other statues, as interpreted in the Union Appeal, is federally preempted.

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC.

By its attorneys,

Robert J. Munnelly, Jr.
Murtha Cullina LLP
99 High Street
Boston, MA 02110-2320
Telephone: (617) 457-4000
rmunnelly@murthalaw.com

and

William D. Durand, Executive V.P./Chief Counsel
New England Cable and Telecommunications
Association, Inc.
10 Forbes Road, Suite 440W
Braintree, MA 02184
Telephone: (781) 843-3418
wdurand@necta.info

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