THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

DT 10-183

GRANITE STATE TELEPHONE, INC., DUNBARTON TELEPHONE, INC., BRETTON WOODS TELEPHONE, INC., AND DIXVILLE TELEPHONE COMPANY

Petition by Certain Rural Telephone Companies Regarding CLEC Registrations within Their Exchanges

REPLY BRIEF OF segTEL, INC.

After finding that the RLECs have no constitutional right to hearing, the New Hampshire Supreme Court has asked the New Hampshire Public Utilities Commission ("Commission") to determine whether the multi-stage adjudicative hearing requirement provided for by RSA 374:26 and RSA 374:22-g constitutes an impermissible barrier to competitive entry and thus is preempted by 47 USC § 253(a). *See Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 309, 319 (2010). ("*Union Appeal.*") segTEL demonstrates herein that the process constitutes an impermissible barrier to entry for several reasons, and requests that the Commission find the requirements of RSA 374:26 and 374:22-g,II preempted by federal law.

I. Introduction

RSA 374:26, which calls for a public good determination and hearing for new entrants, and RSA 374:22-g,II, which mandates the consideration of several factors for a determination of the public good, are preempted by 47 USC § 253 for several reasons. First, any state registration process than can result in denial for reasons unrelated to the qualifications of the applicant can "prohibit or have the effect of prohibiting the ability of an entity to provide interstate or intrastate

telecommunications services" and is thus preempted. *See* 47 USC § 253(a). Second, in the absence of a *bona fide* request for interconnection and unbundled network elements pursuant to 47 USC § 251(f), consideration of the economic burden on the incumbent will have the effect of prohibiting the ability of an entity to provide interstate or intrastate telecommunications services and is thus preempted. *Id*. Third, the statutory requirement that the Commission make a determination of public good creates a material and procedural constraint on the ability of an applicant to provide interstate or intrastate telecommunications service and is thus preempted. *Id*. Fourth, the stated intent of the Telecommunications Act of 1996 codified at 47 USC § 251 *et seq.* ("Telecom Act") is to "[t]o promote competition and *reduce regulation;*" as such the hearing requirements of the statutes conflict with the federal regime. Fifth, RSA 374:22-g,II effectively prohibits the provision of interstate telecommunications services and is thus preempted by 47 USC § 253(a).

Upon an initial demonstration that the statutes prohibit or have the effect of prohibiting telecommunications services the burden shifts to the State to demonstrate that the restrictions fall within the safe harbor provisions of 47 USC § 253(b). This burden has not and cannot be met. The factors the Commission must consider pursuant to RSA 374:22-g,II cannot be applied in a competitively neutral manner and are not contained within the safe harbor provisions of 47 USC § 253(b). To the extent that consideration of universal service is permissible, such consideration is not severable from the preempted portions of the law. Since RSA 374:22-g,II can only be construed in its entirety it must be preempted in its entirety.

Finally, the RLECs pose the academic question of whether, despite preemption, there is a process of state registration that would not be preempted. segTEL submits that there is. The process set out by the Commission in its rules adequately ensures consideration of public safety

and welfare, quality of service and the rights of consumers, and bases denial of registration on those and only those criteria that fall entirely within the safe harbor provision of 47 USC § 253 (b).

Granite State Telephone, Inc., Dunbarton Telephone, Inc., Bretton Woods Telephone, Inc., and Dixville Telephone Company (the "RLECs") make numerous claims to the contrary in the Initial Brief of the Rural Telephone Companies filed February 11, 2011 ("Initial Brief") in this proceeding, which segTEL disputes. segTEL requests that the Commission confirm its determination in Order 24,939 issued February 6, 2009 in Docket No. DT 08-130, *Re Application of Metrocast Cablevision of New Hampshire Application for Certification as a Competitive Local Exchange Carrier ("Metrocast Approval Order")* that prohibiting the registration of competitive local exchange carriers ("CLECs") in non-exempt incumbent local exchange company ("ILEC") service territories is inconsistent with federal law.

II. RSA 374:22-g,II and RSA 374:26 are preempted by 47 USC § 253(a).

A. RSA 374:22-g,II and RSA 374:26 are preempted by 47 USC § 253(a) because they allow the Commission to deny entry to a competitive provider.

The RLECs argue in their Initial Brief that all of the state statutes preempted by the Federal Communications Commission ("FCC") "did not address statutes or regulations directing the applicant to demonstrate how competitive entry served the public good *in the situation involving the particular parties*." (Initial Brief, pg. 9. Emphasis added.) By making this claim the RLECs argue the CLEC case for why federal law preempts the New Hampshire statutes: RSA 374:26 and RSA 374:22-g,II do not require that the Commission consider the qualifications of the new competitor, but rather the "*situation*" involved, a factor that could result in the Commission denying an otherwise qualified entrant. The RLECs request that the Commission

rescind segTEL's approval is ample evidence that the RLECs envision a process that would deny a carrier whose entry has already been determined to be in the public good from providing service in certain areas of the state, thereby prohibiting market entry.

47 USC § 253(a) states that no State regulation shall "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." RSA 374:22-g,II allows the Commission to deny competitive entry. Yet the FCC has found that a state certification process that could end in denial of an application is a barrier to entry. *See In the Matter of Vonage Holdings Corporation*, 19 F.C.C.R. 22404, WC Docket No. 03-211, November 12, 2004. ("*Minnesota Preemption Order.*") In the *Minnesota Preemption Order,* the FCC preempted state entry requirements that are very similar to those outlined in the Stipulation of Facts filed by the parties in this docket precisely because "[t]he application process can take months and result in denial of a certificate, thus preventing entry altogether." *Id.* Even if the application were to be approved, the FCC found that, "[t]he administrative process involved in *entry certification and tariff filing requirements, alone,* introduces *substantial delay* in time-to-market and ability to respond to changing consumer demands, not to mention the impact these processes have on how an entity subject to such requirements provides its service." *Id*. (Emphasis added.)

In explaining its decision, the FCC noted that it removed entry requirements altogether because "...retaining entry requirements could stifle new and innovative services whereas blanket entry authority, *i.e.*, unconditional entry, would promote competition." *Id*.

Nonetheless, the RLECs rely on the existence of state CLEC entry requirements which range from simple registration procedures to full-blown application proceedings that can take many months, listing the regulations of Connecticut, Alabama, Georgia, North Carolina, and

South Carolina as "evidence" that New Hampshire's hearing requirements in RSA 374:26 and 374:22-g,II are lawful. *See* Initial Brief at pg. 7-8. However, none of these processes cited have yet been challenged at the FCC, where their survival would be in considerable doubt. In fact, when the FCC has been called upon under 47 USC § 253(d) to preempt a state or local requirement, the FCC has consistently preempted state requirements that prohibit entry or establish application moratoria because such requirements have the effect of prohibiting competitive entry. In a 1997 case, the FCC described the role of 47 USC § 253 in the Telecom Act:

> ... section 253(a) at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. *Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers*.
>
> *Silver Star Preemption Order*, 12 F.C.C.R. at 15656-57, £ 38 (emphasis added) ("*Wisconsin Preemption Order*").

Following the FCC's preemption of Wisconsin statutes, the Wisconsin Public Utilities Commission noted "... imposition of a hearing and its associated proceeding formalities for their duration would have the 'effect of prohibiting' [an] applicant from being a competing provider of service." See *In Re Sprint Communications*, No., 6055-NC- 103, Wisconsin PUC, 2008 WL 2787762 PUR slip copy (*Wisconsin Sprint Order.*)

The RLECs claim in their brief that this proceeding is about "whether state-imposed entry requirements rise to such a level that it is effectively an outright prohibition" (Initial Brief, pg. 4). It is settled law that this is the wrong standard in the First Circuit, where the Court found that preemption can be based on a showing of "a mere possibility of prohibition, rather than actual or effective prohibition." *See Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla, supra*, 450 F.3d at 18. ("*Puerto Rico Preemption.*") By attempting to reset the

standard to "outright prohibition" the RLECs admit that the mere possibility of prohibition is embodied in the RSAs in question, and hence have ceded the fight.

In fact, the RLECs assure us that "it *may well be* that the Commission will grant a CLEC application following an RSA 374:22-g inquiry...," indicating their belief that the outcome of such an inquiry would be in some doubt. Therefore, although the RLECs describe the hearings process as "inconvenient" (Initial Brief, pg. 4), and "conducive to fair and balanced competition" (*Id.*, pg. 6), they neglect to note that denying a competitive application is, in fact, a prohibition to entry. For this reason alone, RSA 374:26 and RSA 374:22-g,II are preempted by 47 USC § 253.

B. IN THE ABSENCE OF A *BONA FIDE* REQUEST FOR UNES PURSUANT TO 47 USC § 251(F), AN INQUIRY INTO THE ECONOMIC BURDEN ON THE ILEC IS PREEMPTED.

In their Initial Brief, the RLECs attempt to muddy the waters by calling the Commission's attention to 47 USC § 251(f), which codifies certain protections for rural carriers (the "Rural Exemption.") The RLECs indicate that Georgia explicitly recognizes that "rural carriers are exempt from Section 251(c) of the [Telecom Act] under Section 251(f)." (Initial Brief, pg. 7) However, the RLECs fail to mention that the Rural Exemption is not relevant here. It is true that 47 USC §251(c) imposes requirements on ILECs such as the duty to negotiate interconnection agreements and provide unbundled network elements (UNEs) and collocation at TELRIC rates. It is also true that 47 USC § 251(f)(1) of the Act provides that a rural telephone company is exempt from the requirements of 47 USC § 251(c) unless the state commission finds that the RLEC has received a *bona fide* request for interconnection, services, or network elements. "Once a requesting carrier has made a *bona fide* request for interconnection, services, or network elements, incumbent rural LECs bear the burden of proving that they should continue to be exempt from the requirements of section 251(c)." *See In The Matter of Implementation of*

The Local Competition Provision of the Telecommunications Act of 1996, 11 F.C.C.R. 20166, CC Docket No. 96-98, December 18, 1996. At that point the state commission is charged with determining that the request "is not unduly economically burdensome, is technically feasible, and is consistent with [universal service]." (47 USC § 251(f))

Congress, by imposing an exemption for § 251 (c) unbundling here and nowhere else in the Telecom Act, clearly intended that the RLEC exemption would not be absolute. The only possible interpretation of 47 USC § 251(f) is that all competition is valid in RLEC territory until a competitor seeks to compel the RLEC, by making a *bona fide* request, to open up its own network to competitors.

segTEL has not made a *bona fide* request pursuant to 47 USC § 251(f), nor has segTEL requested access to RLEC network elements or collocation. Since it is only when a *bona fide* request is received that the Telecom Act's provisions regarding terminating the Rural Exemption are invoked, those provisions are not relevant here. Only after a *bona fide* request is submitted and termination of the Rural Exemption is under consideration does the Commission have the authority under federal law to determine that a CLEC request is not "unduly economically burdensome, technically feasible, and consistent with [universal service]."

In the absence of a *bona fide* request, however, the federal regime does not provide for inquiry into economic burdens on the ILEC or technical feasibility of a CLEC's plans for service. Relevant to small, rural telephone utility territories, the FCC has found that:

> [b]y granting [RLECs] relief from interconnection obligations instead of an outright prohibition on competition ... Congress demonstrated its intent to open all markets to potential competitors - even markets served by rural or small LECs that may qualify for interconnection relief. In other words, in choosing a less competitively restrictive means of 'protecting' rural and small LECs, Congress

> revealed its intent to preclude States from imposing the far more competitively restrictive protection of an absolute ban on competition.
>
> *Wisconsin Preemption Order*, £ 43.
> *See also Silver Star Reconsideration*, 13 F.C.C.R. at 16363, £ 14. ("*Wisconsin Preemption on Reconsideration*.")

The FCC also notes that a local statute that covers the same ground as 47 USC § 251(f) is not necessarily saved from preemption. "That both the 1996 Act and [the Tennessee statute] address similar concerns about the effect of competitive entry on rural incumbent carriers does not insulate the Tennessee statute from section 253 preemption. Instead, Congress appears to have entirely occupied the field of regulating rural competitive entry when it addressed the issue comprehensively in sections 251(f) and 153(37)." *Tennessee Preemption Order*.

Since the rural exemption is the only protection for RLECs that Congress authorized, the state may not impose additional protections without effectively prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. For this reason RSA 374:26 and RSA 374:22-g,II are preempted.

C. RSA 374:26 AND RSA 374:22-G,II ESTABLISH THE REQUIREMENT AND CRITERIA OF A FINDING OF PUBLIC GOOD THAT IMPOSES A MATERIAL AND PROCEDURAL CONSTRAINT ON THE ABILITY OF AN APPLICANT TO PROVIDE TELECOMMUNICATIONS SERVICES AND IS THUS PREEMPTED BY 47 USC § 253(A).

RSA 374:26 sets the standard by which the Commission may grant or withhold permission to an entity seeking to expand its existing franchise. *Union Appeal*, citing *Appeal of Public Serv. Co. of N.H.*, 141 N.H. 13, 16-17 (1996). Pursuant to RSA 374:26, the Commission may not grant permission unless it finds "after due hearing, that such engaging in business, construction or exercise of right, privilege or franchise would be *for the public good*, and not otherwise." *See id*. Emphasis added. RSA 374:22-g,II sets forth the numerous factors, all of which the Commission must consider when determining whether allowing more than one

provider to provide telecommunications services in a single territory is for the "public good." Several of these factors concern the impact that granting such permission will have on the ILEC, such as "fairness," "economic efficiency," "universal service," its "opportunity to realize a reasonable return on its investment" and its ability to comply with "carrier of last resort obligations." RSA 374:22-g,II.

Since the statutory requirement that an applicant's services must be considered to be in the "public good" goes further than simple registration requirements, requiring such a finding prior to market entry also imposes a barrier to entry prohibited by 47 USC § 253(a). A plain reading of 47 USC § 253(a) presumes that an entity engaged in the provision of telecommunication services is *entitled* to provide those services. *Wisconsin Sprint Order*. The Pennsylvania Commission found that, "[p]ursuant to the broad language of Section 253(a) of the Act, it appears that the Commission is prohibited from restricting the entry or preventing the continued operations of a telecommunications service provider whether or not the Commission finds the provision of services by the carrier to be in the public interest. Accordingly, it appears that the legal basis underlying the issuance and maintenance of all telecommunications certificates of public convenience, the public interest finding has been preempted by the Act ..." *See In re: Implementation Order of the Telecommunications Act of 1996*, Order entered June 3, 1996, Docket No. M-00960799. Later, the Court found that "[a]ny provision that states that the delivery of [CLEC] services must first be 'fair' or 'economically efficient' in order to be permitted in the market, directly conflicts with 47 USC § 253(a)." *See Armstrong Communications, Inc. v. Pennsylvania Public Utility Commission*, 768 A.2d 1230, (2001).

New Hampshire's statutes give the Commission the latitude to reject any competitive application that it considers not "fair" or "economically efficient," without regard to which entity

fairness or economic efficiency applies. The Commission may also reject a CLEC application on the basis of the incumbent utility's opportunity to realize a reasonable return on investment or its carrier of last resort obligations. The Court of Appeals for the Second Circuit held that the combination of both substantive statutory need-type criteria and processing delays, in the context of a municipal right-of-way control question, resulted in a finding of preemption under 47 USC § 253(a). *In TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), the court found preemption because (a) the city retained the right to reject a franchise application based upon any "public interest factors," thereby retaining a right to prohibit the provision of telecommunications services, and (b) the application process imposed extensive delays.

New Hampshire's certification process is indistinguishable from New York's preempted right of way regulations. In both situations the government impermissibly seeks to retain legal control over an entity's ability to furnish telecommunications services in a geographical area, and denial would favor the incumbent provider. *Cf. Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002) (court held the city exceeded its authority to manage rights-of-ways under 47 USC § 253(c) when it retained discretion to grant or deny a permit and also required excessive information on the proposed use of the applicant's property).

If the Commission were to deny segTEL's application to compete in certain RLEC territories based on a finding that it was not in the public good, such a finding would not only would favor the ILEC, but abrogate the Commission's prior findings. On January 11, 2002, by Order No. 23,898 issued in Docket No. DT 01-207 ("*segTEL Approval Order*"), segTEL was certified as a CLEC. The Commission found that segTEL satisfied the requirements of Puc 1304.01(a)(1) and (2) and, further, that authorization was in the public good, thus meeting the

requirement of Puc 1304.01(a)(3).[1] In making this finding, as directed by RSA 374:22-g,II, the Commission considered the interests of competition, fairness, economic efficiency, universal service, carrier of last resort, the incumbent's opportunity to realize a reasonable return on its investment, and recovery by the incumbent of expenses incurred. segTEL already holds a certificate of public good in New Hampshire and has continuously provided high-quality facilities-based service for nearly a decade. Subsequent denial of segTEL's application to compete in an RLEC territory (absent a show cause hearing regarding segTEL's ability to provide safe and reliable service) could only be based on different criteria for a finding of public good. Thus, because segTEL's provision of telecommunications services has already been determined to be in the public good, any denial would have to be based on the *territory* being served and the *company* against which segTEL would be competing and not on segTEL's actual performance and capabilities. This would create impermissible protection for RLECs not authorized by the Telecom Act and is, for that reason, preempted by 47 USC § 253.

D. THE STATED INTENT OF THE TELECOM ACT IS TO "PROMOTE COMPETITION AND REDUCE REGULATION;" AS SUCH THE HEARING REQUIREMENTS OF THE STATUTES ARE INHERENTLY IN CONFLICT WITH THE FEDERAL REGIME.

The preamble to the Telecom Act describes it as "An Act To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Telecom Act, S.652* entered in the Second Session of the One Hundred and Fourth Congress. RSA 374:26 and RSA 374:22-g,II impose requirements on new entrants in a manner similar to requirements that the FCC has found to create "substantial delay," as well as providing

[1] The rules cited here were those in effect at the time of segTEL's authorization. The Commission has since promulgated new rules for registration of CLECs in Puc Part 400, and Puc Part 1300 is now rules for pole attachments.

a process by which the Commission can deny CLEC applications altogether, in contravention of the Congressional purpose of the Telecom Act. *Minnesota Preemption Order*.

Although the Telecom Act stands on its plain language, the legislative history indicates that the Senate proposed the language of 47 USC § 253(a) at issue here "to remove *all* barriers to entry in the provision of telecommunications services" (emphasis added), and that 47 USC § 253(b) clarified the ability of a state to protect the rights of consumers, except that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." H.R. Rep. 104-458, at 126-127 (1996) (Conf. Rep.). *See also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md*., 535 U.S. 635, 638 (2002) ('Telecommunications Act of 1996 … created a new telecommunications regime designed to foster competition in local markets.') and *WWC License, LLC v. Boyle*, 459 F.3d 880, 884 (8th Cir. 2006) ('With the Act, Congress moved to abolish the system of monopolies in favor of a competitive system with multiple potential carriers.')

Both the New England Cable and Telecommunications Association ("NECTA") and segTEL have provided testimony demonstrating the lengthy processes for CLEC entry into RLEC territory. See NECTA Rebuttal Testimony, pp. 9-10; segTEL Response to NECTA-SEGTEL 1-1 and 1-2; and segTEL response to RLECs-SEGTEL 1-1 and 1-2. segTEL's testimony provided specific examples of the kinds of barriers to entry that CLECs face. However, 47 USC § 253(a) is not concerned with the financial, geographical, economic, operational and competitive barriers to entry that a CLEC must overcome to enter a market. Rather, it is those barriers the State erects that are at issue here. RSA 374:26 and 374:22-g,II establish barriers that include an impractical burden of proof regarding RLEC operations, procedural delays, and the possibility that an application will be denied. The parties stipulated to

a process that, for each and every CLEC application in each and every ILEC territory (including that of FairPoint), is projected to take, at a minimum, many months.

In its Initial Brief, NECTA reiterated the actual time delay faced by recent CLEC applicants:

- The Comcast CLEC certification docket in certain TDS RLEC territories (DT 08-013) took approximately *one and a quarter years*, from the December 2007 application through the lengthy motion, testimony and briefing process up to the final February 2009 decision.

- The Metrocast CLEC certification docket in an RLEC territory (DT 08-130) took approximately *one and a half years,* from the September 2008 filing for the certification request, through the affected RLEC request for an the Commission's denial of a rehearing and up to the final March 2010 decision of the New Hampshire Supreme Court on appeal that reversed the Commission's order in part and remanded it for the instant proceeding;

- The IDT/Metrocast interconnection arbitration process (DT 09-048) took approximately *14 months,* from the notice of intent to commence interconnection discussions in October 2008, through the filing of the arbitration petition in March 2009, the lengthy arbitration process (including the filing of two separate motions to dismiss by the affected RLEC) and up to the post-decision taking effect of the arbitrated agreement in mid-December 2009.

See Initial Brief of NECTA at 10-11.

The RLECs claim there "is no evidence that these procedures pose a prohibitive barrier to entry" (Initial Brief, p 15) but, again, the barrier does not have to be prohibitive to inconsistent with the intent of the Telecom Act. The Tenth Circuit found that "the extent to which the statute is a 'complete' bar is irrelevant. § 253(a) forbids any statute which prohibits or has 'the effect of prohibiting' entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it." *RT Communications, Inc. v. F.C.C.*, 201 F.3d 1264, (C.A.10,2000).

Imposition of a hearing and associated proceeding formalities *for their entire duration* have "the effect of prohibiting" the applicant from being a competing provider of telecommunications services. *See Wisconsin Preemption Order*, £ 6.

Delay impedes competition, and segTEL has suffered material delay of entry into the RLEC market for the pendency of this docket. In this case, the incumbent RLECs have been free to market any new telecommunications service they wish, while segTEL and its peers are subject to statutory hurdles simply to become a competitor, let alone have a competitively neutral opportunity to supply the market with new and innovative telecommunications services. Despite the fact that RSA 374:22-g,I declared that all RLEC territories shall be non-exclusive, the RLECs seek to delay and materially prohibit entry by competitive service providers. segTEL cannot even begin to undertake efforts to overcome financial, geographical, economic, operational and competitive barriers to entry because segTEL's authority to provide service is in limbo.

segTEL submits that *any* state process that has the potential for creating substantial delays for a CLEC to compete in the market is preempted and the imposition of a hearing requirement further imposes a material barrier to entry that lasts as long as the RLEC's right and inclination to request a hearing persists.

E. RSA 374:22-G,II EFFECTIVELY PROHIBITS THE PROVISION OF INTERSTATE SERVICES AND IS THUS PREEMPTED BY 47 USC § 253(A).

The Commission has jurisdiction over the provision of those local exchange services that have been defined as intrastate. Yet many of the services segTEL and others provide are a mix of interstate and intrastate services. To the extent that segTEL cannot currently provide intrastate local exchange services, segTEL's ability to provide certain interstate services is also curtailed.

Although the RLECs cavalierly offer that "[n]o particular CLEC application will be predetermined by this proceeding" (Initial Brief, pg. 3) they overlook that it is in this proceeding

that they have asked for segTEL's authority to be rescinded and it is that request to rescind which has already predetermined segTEL's ability to offer interstate and intrastate services in certain RLEC territories for the pendency of this docket. Because of this material and effective prohibition on an applicant's ability to provide interstate telecommunications services, RSA 374:22-g,II is preempted by 47 USC § 253(a).

III. Once preempted, RSA 374:26 and RSA 374:22-g,II are not saved by the safe harbor provisions of 47 USC § 253(b).

Once a provision runs afoul of 47 USC § 253(a), the statute may still survive if the State shows that it falls under the savings clauses of 47 USC § 253(b), which preserve a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; *and* (iii) "necessary" to accomplish certain enumerated public interest goals. Thus, RSA 374:22-g,II must be preempted under 47 USC § 253(d) unless it meets all three of the criteria set forth in 47 USC § 253(b). The burden of proving compliance with the savings clause of 47 USC § 253(b) rests with the State.

A. RSA 374:26 AND RSA 374:22-G,II ARE NOT COMPETITIVELY NEUTRAL AND THUS DO NOT FALL UNDER THE SAFE HARBOR PROVIDED BY 47 USC § 253(B)

There are three reasons why, even if RSA 374:26 and 374:22-g,II are saved by other provisions, they fail to meet the competitive neutrality requirement of 47 USC § 253(b). First, the statutes give the Commission the latitude to treat CLEC applicants differently from each other. Second, the statutes mandate different treatment of CLEC applicants and the RLEC. Finally, RSA 374:22-g,II and RSA 362:6 mandate different treatment of CLEC applicants and

other providers of intrastate services. Therefore, neither RSA 374:26 nor RSA 374:22-g,II fall within the safe harbor provisions of 47 USC § 253(b).

1. RSA 374:26 and RSA 374:22-g,II allow the Commission to deny market entry to some competitors in a manner that is not competitively neutral and thus do not fall under the safe harbor provided by 47 USC § 253(b)

The RLECs argue in their Initial Brief that the predominant competitive business model "... focuses on services to low cost, high volume services such as business service, high capacity private lines, and middle mile transport and backhaul." (Initial Brief, at pg. 9.) The RLECs go on to say that "[a] *key factor to be considered here* is the issue of high cost versus low cost subscribers and the effect of mandatory rate averaging, which directly affects the [ILEC's] rate of return and its ability to sustain its obligations as the carrier of last resort (a state term that is closely related to [eligible telecommunications carrier] designation federally.)" (*Id*. pg. 10. Emphasis added.)

Thus, the RLECs' position implies that a competitive entrant whose business model is identical to the incumbent model might allow a grant of authority, while those entrants with a different business model that can be shown to have a direct affect on the incumbent's rate of return might be denied. Such a result is in direct conflict with the Telecom Act's requirement that state requirements be competitively neutral.

In addition, application of the statute as contemplated by the Stipulation of Facts means that a CLEC application may succeed in one RLEC territory and fail in another. Indeed, this has already come to pass, as segTEL's application in the territories of TDS, Union Telephone and Northland was granted and is not in danger of rescission. In similar manner, the application of CRC Communications of Maine, Inc., was recently granted in Docket No DT 10-213. In that

docket, the Commission wrote, "Since there are already regulated and unregulated providers in the area, we agree that allowing CRC entry would not be unfair. We reached a similar conclusion in a prior petition of a CLEC to enter the territory of an RLEC, *see* Comcast Phone of New Hampshire, Order No. 24,938 (Feb. 6, 2009) at 19-20, where we found that fairness weighed in favor of permitting entry, in part because regulated and unregulated services were already being offered in the subject territory." (Commission Order No. 25,165 issued November 10, 2010, p 3-4.) While the Commission cited to the RSA 374:22-g,II factor of fairness in its order, the Commission could well have determined that "fairness" was so vague and subjective it could not be applied in a competitively neutral manner as required by 47 USC § 253(b).

Requiring the Commission to consider such factors as "fairness" and "economic efficiency" prior to granting a CLEC application invites discriminatory treatment of CLEC applicants. The Commission has the authority to completely prevent a CLEC from entering into a marketplace that has already been deemed, pursuant to RSA 374:22-g,I, "non-exclusive" solely based on the State's imposition of arbitrary and capricious factors such as "fairness." segTEL can hardly imagine a barrier less conducive to neutral treatment.

Because the Commission has the latitude to certify some applicants and not others, based on factors beyond the applicant's ability to provide safe and reliable telecommunications services, RSA 374:22-g,II is not competitively neutral and cannot be saved by the safe harbor provisions of 47 USC § 253(b).

2. RSA 374:26 and RSA 374:22-g,II mandate different treatment of a CLEC applicant and the RLEC and thus do not fall under the safe harbor provided by 47 USC § 253(b)

In its *Tennessee Preemption Order*, the FCC determined that, "...section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter*

alia, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue." The FCC clarified that all of the participants includes the incumbent, saying, "[n]either the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to the market as a whole, *including the incumbent LEC*." *In the Matter of AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 14 F.C.C.R. 11064, 11070-71, ¶ 16 (1999) (*Tennessee Preemption Order*) citing *Wisconsin Preemption Order*.

For this reason, RSA 374:26 and RSA 374:22-g,II would be preempted if challenged at the FCC. S*ee, e.g., In the Matter of American Communications Services, Inc.*, 14 F.C.C.R. 21,579, 21,616-21 (1999) (federal law preempts certain provisions of Arkansas law that make it more difficult for another carrier to compete in area served by rural telephone company). The effect of the statutes is to impose a substantial and anti-competitive entry barrier for a specific class of non-incumbent service providers. The FCC explicitly rejected the argument that "competitive neutrality" was satisfied if new entrants as a group are treated equally, stating that it has consistently construed the term "competitive neutrality" as requiring competitive neutrality *among the entire universe of participants and potential participants in a market. Wisconsin Preemption on Reconsideration*, £ 10 (footnote omitted, emphasis added). *Accord, Tennessee Preemption Order*.

To the extent that segTEL and other CLECs have been prohibited from providing telecommunications services during the pendency of this docket, competitively neutral treatment

requires that the RLEC be enjoined from providing telecommunications services as well. Since that is impractical, the Commission can avoid conflict with the federal regime by finding that federal law preempts the State requirements, and permitting CLEC entry in the RLEC market.

3. RSA 374:26 and RSA 374:22-g,II and RSA 326:6 mandate different treatment of CLEC services and cellular mobile radio communications services and thus do not fall under the safe harbor provided by 47 USC § 253(b)

Any State statute which has the effect of allowing any telecommunications provider except a state-regulated competitive local exchange carrier from having access to any telecommunications market necessarily violates 47 USC § 253 on its face. "Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to all carriers in that market." *Tennessee Preemption Order.*

However, the State has provided for different statutory treatment for participants and potential participants in the market. While RSA 374:26 and 374:22-g,II provide that the Commission will have a hearing to consider the impact of competition before allowing competitive entry by CLECs, in RSA 362:6 the State provided statutory exemption from these statutes and from regulation altogether for cellular mobile radio communications services, stating that "[s]uch services shall not be subject to the jurisdiction of the public utilities commission pursuant to this title." These statutes, taken together, ensure uneven treatment between CLECs and cellular providers, resulting in a failure to maintain competitive neutrality in contravention of 47 USC § 253(b).

For this and all the foregoing reasons, RSA 374:26 and 374:22-g,II are preempted on the basis of failure to ensure competitive neutrality.

B. DESPITE THE SAFE HARBOR ACCORDED TO CONSIDERATION OF UNIVERSAL SERVICE, RSA 374:26 and RSA 374:22-g,II ARE NOT SAVED BY THE SAFE HARBOR PROVISIONS IN 47 USC § 253(B) BECAUSE THE OTHER FACTORS REQUIRED BY 374:22-G,II ARE PREEMPTED.

The RLECs contend that under 47 USC § 253(f) "... the Commission can grant authority in RLEC territories on the condition that the entrant compete on a level playing field, providing all of the services, to all customers, that are supported by federal universal service support mechanisms."

Certainly 47 USC § 253(f) provides that states may investigate the impact of entry on universal service. However, the RSA 374:22-g,II does not solely require the Commission to consider universal service. Rather, RSA 374:22-g,II mandates that the Commission "shall" consider universal service "and," without limitation, five other factors, none of which were authorized by Congress, in making a determination of the public good. Under the principles of statutory construction, each word must be accorded meaning. A plain reading of the statute shows that the Commission is mandated by the word "shall," unless preempted, to consider all of the factors listed, by the word "and." Consideration of only one of the factors is not contemplated. In fact, in the *segTEL Approval Order* (as well as, segTEL believes, all CLEC approvals the Commission has ordered since the original enactment of 374:22-g) the Commission has followed that mandate and considered all of the factors required. Consideration of universal service is not independently severable from consideration of those factors that are preempted by 47 USC § 253(b) and is not saved by the competitive neutrality requirements of 47 USC § 253(b). Despite the safe harbor accorded to universal service, the mandatory components of the statute cannot be severed without completely denuding the statute; therefore, the statute must be preempted in its entirety. For these reasons, consideration of universal service under RSA 374:22-g,II is also preempted.

IV. There are state registration requirements that are consistent with federal law.

Finally, the RLECs pose the rhetorical question of "whether we can imagine any effective process" of state registration that would not be preempted. (Initial Brief, pg. 3.) Since segTEL has shown that the State statutes are preempted for many reasons, it is reasonable to question what is left to the State in the regulation and certification of competitive entrants to the market. segTEL believes that the Commission considered that question when it undertook the approval of new CLECs shortly after the Telecom Act was passed.

At that time, the Commission promulgated competitively neutral rules for the registration of CLECs that have historically been sufficient to ensure public safety and welfare, the provision of quality services, and to safeguard rights of consumers. The Commission's rules and processes have stood the test of time and have resulted in a vibrant competitive landscape in those parts of New Hampshire now served by FairPoint. Although the New Hampshire Supreme Court found that the rules require some revision due to changes in RSA 374:22-g, such revision does not require complete rejection or reconsideration of those rules.

As the Commission found in the *Metrocast Approval Order*, applications made pursuant to the Commission's current rules ensure the proper and permissible finding of public good, and grant the Commission the authority to base a denial of registration on those -- and only those -- criteria that fall entirely within the safe harbor provision of 47 USC § 253(b).

V. Conclusion

RSA 374:26 and RSA 374:22-g,II are preempted by 47 USC § 253(a) because: (a) they mandate a registration process than can result in denial for reasons unrelated to the qualifications of the applicant; (b) are undertaken in the absence of a *bona fide* request for unbundling; (c) require that the Commission make a determination of public good that creates a substantive and

procedural constraint on the applicant; (d) fail to comply with the stated intent of the Telecom Act to reduce regulation; and (e) effectively prohibit the provision of interstate and intrastate services. .

Having demonstrated that the statutes are preempted, the State must then show that the statutes are not saved by the safe harbor established by 47 USC § 253(b). Such a showing cannot be made because the statutes cannot be applied in a manner that is competitively neutral and because the consideration of universal service cannot be independently severed from consideration of the other factors required by RSA 374:22-g,II. Ultimately, the process followed by the Commission when it granted segTEL's request for authority in RLECs territories was compliant with New Hampshire statutes and consistent with the federal regime.

For all of the reasons set forth herein, segTEL requests that the Commission confirm its determination in the *Metrocast Approval Order*, find that it is preempted from prohibiting the registration of CLECs in non-exempt ILEC service territories, and affirm its approval for segTEL to operate throughout the state of New Hampshire.

Respectfully submitted,

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By its general counsel,

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cc: Service List