STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2011-0892

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

APPEAL PURSUANT TO RSA 541:6
OF AN ORDER OF THE PUBLIC UTILITIES COMMISSION

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

Agency Decisions

QUESTION PRESENTED

Did the Public Utilities Commission ("Commission" or "PUC") in its October 21, 2011 Order No. 25,277 on remand from this Court ("Order") commit reversible error by ruling that a state-mandated multi-factor adjudicative "public good" process for each competitive local exchange carrier ("CLEC") entering the territory of each rural incumbent local exchange carrier ("RLEC") materially inhibits or limits competitive entry into rural areas, thereby subjecting the adjudicative process to federal preemption pursuant to 47 U.S.C. § 253?[1]

RELEVANT LEGAL PROVISIONS

RSA 374:22-g	Addendum to this Brief
RSA 374:26	Addendum to this Brief
47 U.S.C. § 253	Appendix to RLEC Brief, p. 76
N.H. Puc Rule 431.01	Appendix to RLEC Brief, p. 78

[1] NECTA rejects the Questions Presented in the RLECs' Brief as excessively complicated, inappropriate and reflecting misstatements of fact and law. Specifically, Questions Presented Nos. 1 and 3 refer to "complete prohibition" and "prohibit the entry." The applicable regulatory standard discussed infra and cited by this Court in the predecessor appeal does not require "prohibition" of competitive entry to justify preemption, only a material limitation or inhibition on competition. Questions Presented No. 2 refers to the Commission's alleged failure to "find that it may impose competitively neutral conditions." To the contrary, the Order expressly acknowledges the Commission's authority to impose conditions but determines that the proper forum for considering changes to current rules and policies governing competitive markets is not during case-by-case CLEC market entry adjudications but, rather, in industry generic rulemakings or other forums.

COUNTER-STATEMENT OF THE CASE

Appellee New England Cable and Telecommunications Association, Inc. ("NECTA") is a trade association representing most New England region cable television companies and their affiliates. NECTA generally accepts the procedural factual elements of the "Statement of the Case" and "Background and Procedural History" sections in the April 17, 2012 Brief of Appellants Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc. and Granite State Telephone, Inc. (collectively "RLECs" and "RLEC Brief"), but notes that the RLECs' recitation of an overbroad and largely uncited history of telecommunications regulation should not be considered a comprehensive description of applicable federal and state law. See RLEC Brief, pp. 4-7. NECTA also does not concede the accuracy of RLEC editorial characterizations of the procedures, facts and law in the Commission proceeding below. Id., pp. 7-10.[2] Finally, NECTA specifically objects to the following two substantial inaccuracies and omissions.

First, in summarizing the Commission proceedings below on remand from the predecessor case, Appeal of Union Telephone Company d/b/a Union Communications, 160 N.H. 309 (2010) ("Union Telephone"),[3] the RLEC Brief (at 8-9) correctly reproduces the joint

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[2] See generally DT 10-183: Rural Telephone Companies, CLEC Registration within RLEC Exchanges, Order on the Merits (October 21, 2011), reproduced in Record Appendix to RLEC Brief, pp. 1-38 [hereinafter "R. 1-38"].

[3] Union Telephone originated when MetroCast Cablevision of New Hampshire, LLC ("MetroCast"), a NECTA member, received a CLEC registration from the Commission in an RLEC territory without a RSA 374:22-g and RSA 374:26 adjudicative proceeding. Following an appeal brought by the affected RLEC, Union Telephone Company d/b/a Union Communications ("Union"), and participation by other RLECs as amicus curiae, this Court reversed on the necessity of an adjudicative proceeding under state law, Union Telephone, 160 N.H. at 319, but remanded to the Commission for consideration of whether the adjudicative proceeding requirement should be subject to 47 U.S.C. § 253 preemption. Id. at 321. On remand, NECTA participated in place of MetroCast, the four RLEC Appellants participated in place of Union, and Co-Appellee segTel, Inc. ("segTel") participated on its own behalf. See R. 3-4.

stipulation confirming CLEC adjudicative entry procedures in rural areas but incorrectly asserts that such procedures represent a "limited CLEC registration process." (Emphasis added.) In practice, the process agreed to in the joint stipulation and the subject of this appeal is an extensive, costly and time consuming Commission adjudication required by RSA 374:22-g and RSA 374:26 as construed by this Court in Union Telephone and as recognized by the Commission in the Order below.[4] The Order concludes that such a burdensome process prior to entry, with a potential for entry denials, impedes competition and is subject to 47 U.S.C. § 253 preemption.[5]

Second, the RLECs omit mention of the substantial record the Commission developed and relied on in crafting the Order. See RLEC Brief at pp. 8-10 (discussing the stipulation and the Commission's analysis but failing to mention initial and rebuttal testimony from NECTA's expert; initial testimony from a segTel officer; initial and rebuttal testimony from an RLEC consultant; and voluminous discovery responses from all parties); see also Record Appendix to RLEC Brief passim (including Commission Orders and applicable federal and state law, but excluding documentation of all record facts).[6] Contrary to the mistaken impression sought to be

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[4]The only non-adjudicative "registration" process for CLEC entry occurs pursuant to Puc Rule 431 in the territory of the "non-exempt ILEC" (i.e., FairPoint). See Puc Rule 431.01.

[5] Accord Final Decision, Re Sprint Communications Co. L.P. No. 6055-NC-103, 2008 WL 2787762 (Wisconsin Public Service Commission May 9, 2009) (preempting, under 47 U.S.C. § 253, a state law adjudicative proceeding requirement applicable to CLEC entry requests in RLEC territories in Wisconsin).

[6] The RLECs' failure to include relevant parts of the factual record in the Record Appendix and citing in its Argument Section to selective facts from the underlying record of the Commission proceeding (e.g., RLEC Brief at p. 16 (citing to Pelcovits Rebuttal and Meredith Initial Testimony)) violates Supreme Court Rules 13(2), 13(3), 14(1) and 17(1).

conveyed by the RLEC Brief, the Commission issued its Order with the benefit of detailed factual and policy arguments from the RLECs, NECTA and segTel.[7]

SUMMARY OF ARGUMENT

On remand from this Court's decision in Union Telephone, the Commission acted properly in determining, following extensive proceedings and expert testimony, that the RSA 374:22-g and 374:26 multi-factor adjudicative hearing required to be applied by the Commission to each CLEC entry request in each of New Hampshire's rural (non-FairPoint) territories was preempted by 47 U.S.C. § 253. The factual and policy findings in the Commission's detailed analysis easily satisfy the review standards articulated by this Court in Union Telephone and should be affirmed. (Pp. 6-7).

The Order determined that consideration of each of the broad and vague mandatory factors in RSA 374:22-g raise complex procedural and substantive questions that could result in anti-completive determinations of who can and cannot offer telecommunications services in RLEC territories. Moreover, to consider these factors in an adjudicative proceeding, using the procedural steps outlined in the previously-referenced joint stipulation filed with the Commission, would burden the applicant with several months of extensive regulatory proceedings (and would cost tens, or even hundreds of thousands of dollars in litigation and administrative costs without any guarantee of success before a CLEC could even begin taking operational readiness steps and making investments needed to find and serve customers). In short, unless the market entry statutory factors and the concomitant adjudication requirement

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[7] See R. 20 ("Before analyzing the issues presented, we designate the record in this case as (1) the Joint Stipulation of Agreed Facts filed on October 5, 2010; (2) the parties' initial and reply briefs; (3) the parties' initial and reply testimony; and (4) all data requests and responses exchanged by the parties.").

were preempted, the certainty of extensive litigation against an entrenched monopolist would limit competitive entry into New Hampshire's rural areas and harm the public interest. Furthermore, the Commission reasonably determined that the RSA 374:22-g and RSA 374:26 process failed to meet the criteria in 47 U.S.C. § 253(b) as a "necessary," "competitively neutral" regulation that may be exempted from preemption. In that regard, the Commission found it was not "necessary" to address competition policy, as it had been addressed by the New Hampshire Legislature when it amended RSA 374:22-g, I, to make all telephone service territories non-exclusive and, thus, found that competition in all areas of the state was in the public good, and continues to be addressed within the pro-competitive nature of § 253 itself. Moreover, insofar as § 253 requires competitive neutrality and universal service, such matters should be considered in industry-wide generic rulemakings rather than in individual market entry proceedings. (Pp. 7-14).

Finally, the various grounds offered by RLECs to challenge the Commission's Order are unpersuasive. The RLECs' unsupported claims that the Commission is abandoning its obligations to ensure competitively neutral conditions in New Hampshire are contradicted by express Commission statements in the Order that the Commission will review those issues in forums other than the competition-inhibiting market entry process. Moreover, the RLECs' assertions regarding similarities between RSA 374:22-g and RSA 374:26 and other state and federal statutes permitting regulation of universal service funding and other public interest obligations lack record support and are irrelevant to the Commission's finding that New Hampshire's statute investigating all of these complex issues in a pre-entry adjudication for each competitor in each RLEC territory would be anti-competitive and preempted. For all of these reasons the RLECs' arguments should be rejected and the Order affirmed. (Pp. 12-19).

ARGUMENT

The Commission's Finding that the Multi-Factor Adjudicative Entry Process for Rural Territories is Federally Preempted Should Be Affirmed.

A. Introduction and Applicable Review Standards.

Pursuant to 47 U.S.C. § 253(a), the detailed 38-page Order preempts, as "prohibit[ing] or hav[ing] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," the multi-factor adjudicative proceeding requirement in RSA 374:22-g and RSA 374:26 for entry into rural (non-FairPoint) territories and finds that the federally preempted process does not fall within the statutory grant of authority for state Commissions to permit competitively-neutral state regulation of certain subjects in 47 U.S.C. § 253(b). See Order passim (R. 1-38).

This appeal involves the Commission's application of 47 U.S.C. § 253, preemption of state and local telecommunications entry barriers, the clear legal standard for which is as follows:

> [I]t is well-established that §253(a) 'authorizes preemption of state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications services.'" [Puerto Rico v. Municipality of Guayanilla, 450 F.3d 9, 16 (1st Cir. 2006)] (quoting Nixon v. Mo. Mun. League, 541 U.S. 125, 128 (2004)). As the [FCC] has explained, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it considers whether the ordinance *materially inhibits or limits* the ability of any competitor or potential competitor to complete in a fair and balanced legal and regulatory environment. Courts have also noted that a prohibition does not need to be complete or "insurmountable" to run afoul of § 253(a). Municipality of Guayanilla, 450 F.3d at 18 (citations and quotations omitted); see also TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002). The question, then, is whether the state system erects a barrier that materially limits or inhibits the ability of any competitor or potential competitor to operate in a fair and balanced regulatory environment.

R. 27-28 (emphasis added); see also Union Telephone, 160 NH at 321 (stating virtually identical standard).

The appeal also involves an order of the Commission, an expert administrative agency whose judgments are entitled to deference. As summarized by this Court, the appellate standard for Commission orders is as follows:

> A party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable.... Findings of fact by the PUC are presumed prima facie lawful and reasonable. .... Moreover, we deferentially review PUC orders such as the ones at issue.... "When we are reviewing agency orders which seek to balance competing economic interests, or which anticipate such an administrative resolution, our responsibility is not to supplant the PUC's balance of interests with one more nearly to our liking." .... "The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy to the informed judgment of the [PUC] and not to the preference of reviewing courts." .... While we give the PUC's policy choices considerable deference, we review the PUC's statutory interpretation de novo....

Union Telephone, 160 NH at 313-14 (internal citations omitted).

B. The Order is Lawful and Should Be Affirmed.

The Order explains in detail the factual and policy grounds supporting the Commission's reasonable conclusion that applying a burdensome RSA 374:22-g and RSA 374:26 adjudicative process to each CLEC rural entry request "materially inhibits or limits" competition in RLEC territories and is preempted by 47 U.S.C. § 253. R. 28-38; see also Union Telephone, 160 NH at 321 (citing the standard from Guayanilla when remanding the issue back to the Commission for consideration of federal preemption). The grounds supporting this preemption finding are compelling and should be affirmed. In contrast to Union Telephone, no issue remains with respect to the applicability of any New Hampshire statutes that would require de novo review

without the deference otherwise afforded by this Court to Commission fact finding and policy judgments. As a result, the Order should be affirmed because the RLECs have not shown, and cannot show "by a clear preponderance of the evidence, that the Order is unjust or unreasonable." Appeal of Verizon New England, 153 NH 50, 56 (2005); Appeal of Conservation Law Foundation, 127 NH 606, 616 (1986) (internal citations omitted) (also explaining importance of deference to the administrative agency for policy reasons).

1. The Multi-Factor Public Good Adjudication Required for Entry Impedes Competition.

The Order focuses on the excessive entry burdens caused by the mandatory "searching inquiry" into each RSA 374:22-g factor as applied to each potential competitor's request to enter each New Hampshire service territory in order to compete with New Hampshire RLECs for rural voice customers. R. 28-32. In addition to the "interests of competition" and "other factors," the inquiry must include each of the following factors:

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

RSA 374:22-g, II.

The Order details the complex and time consuming analysis that would be required for the Commission to consider each of the broadly worded Section 374:22-g factors. R. 28-32.[8]

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[8] As noted by the Order itself (R. 32, at note 2):

> The experience of [Comcast] is illustrative. Comcast first requested authority to enter the territory of various rural subsidiaries of [TDS] on December 12, 2007, which the Commission granted. TDS objected and requested a hearing pursuant to RSA 374:26; authorization was suspended pending the outcome of an adjudicated proceeding. Following discovery and briefing on whether Comcast's entry was consistent with the public good under RSA 374:22, RSA 374:22-g and RSA

Notably, NECTA and segTel highlighted the "incumbent utility's opportunity to realize a reasonable return on its investment" as a factor of the "greatest concern" insofar as it could result in "rate case-like proceedings and involve a thorough review of the costs of the RLEC...which would require extensive examination and customarily take many months to resolve." R. 28. The Commission concurred that a detailed financial analysis would be required in connection with each CLEC application and, moreover, would raise complex issues in the likely event that competitive entry would harm RLEC returns. R. 28-29. A similar rate case-like financial analysis also would be required for the factor requiring recovery of RLEC expenses relating to competition, less "the proportionate benefit or savings, if any, derived by the incumbent as a result of incurring such expenses." R. 29. The vagueness of the "fairness" factor also raised complex policy issues as its evaluation potentially would involve several perspectives including those "of the RLEC, the potential competitor, the consuming public, or some combination of them," as would the mandatory inquiry into "economic efficiency" and the similarly complex issues associated with whether the Commission could even deny entry to inefficient competitors, or conversely deny entry to efficient competitors. R. 30-31. Finally, the Commission itself noted that complex issues associated with examination of universal service and carrier of last resort obligations would be more appropriately handled in an industry-wide rulemaking rather than a burdensome adjudication for CLEC market entry. R. 31.

Based on all of these factors, individually and collectively, the Commission determined that RSA 374:22-g was preempted by 47 U.S.C. § 253(a) as an impermissible barrier to the entry of a competitor or potential competitor seeking to provide intrastate telecommunications services

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374:26, the Commission granted Comcast's request on February 9, 2009....thus, the entry of a CLEC was denied for more than a year to determine whether its entry was consistent with the state statutory requirements.

in an RLEC territory. R. 32. The Order finds further support for this determination in the pro-competition policies embedded within New Hampshire law and in 47 U.S.C. § 253. R. 28. As stated by the Commission:

> The interests of competition have already been addressed by the New Hampshire legislature and by Congress. RSA 374:22-g, I, states that all telephone franchise areas are to be nonexclusive and § 253(a) of the Act requires that there can be no regulations that prohibit any entity from offering services. Moreover, the RLECs have conceded that the "interests of competition" consideration under RSA 374:22-g is already resolved in favor of promoting competition.

R. 28.

Following the detailed inquiry of the burdens on competition caused by the RSA 374:22-g multi-factor test, the Order separately addresses the RSA 374:26 requirement that these factors be investigated in an adjudicative proceeding "before deciding whether to allow a telephone utility to compete in the service area of another telephone utility," in accordance with this Court's interpretation in Union Telephone. R. 32-34. The Commission concluded that the application of RSA 374:26 adjudication to competitive rural entry requests also was preempted, as the Commission did not have the authority to decide not to allow a telephone utility to compete in a service area. R. 32-34. When applied together, RSA 374:22-g and RSA 374:26 would require an adjudicative proceeding for each CLEC entry application to consider each RSA 374:22-g factor. Unless these requirements were preempted, competitors would have to justify spending tens or even hundreds of thousands of dollars in legal and administrative costs and endure many months of delays before entering each rural territory – with no guarantee that entry would even be permitted.[9] The combination of higher costs of entry for these burdensome

[9] Moreover, they would have to do so knowing that the entrenched incumbent RLEC would have compelling business incentives to take every positive action to forestall competition by driving up entry costs and prolonging the entry proceedings, as evidenced by the current and predecessor proceedings.

adjudicative procedures and the limited revenue opportunities associated with smaller service areas of many New Hampshire RLECs would lead CLECs to bypass or limit entry into monopoly rural territories, thereby harming consumers and competitors. See R. 19-20 (portion of Order summarizing reply testimony of NECTA expert Dr. Michael Pelcovits); see also In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC Rcd 2204 at 22415-17 (2004);[10] Re Sprint Communications Company L.P., supra at *9 ("If anything, imposition of a hearing and its associated proceeding formalities *for their duration* would have 'the effect of prohibiting' the applicant from being a competing provider of the service.") (emphasis in original, internal citation omitted).

2. The State Entry Adjudicative Proceedings Fail to Meet the Federal Exception for Competitively Neutral and Necessary Requirements.

In addition to determining that the state statutes were preempted pursuant to 47 U.S.C. § 253(a), the Order alternatively analyzes whether these statutes could be "saved" by 47 U.S.C. § 253(b). R. 34-36. Section 253(b) permits states to impose requirements that are competitively neutral and consistent with universal service legal requirements described in 47 U.S.C. § 254 provided that they are "necessary to preserve and advance universal service, protect the public

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[10] In the Vonage case, the FCC observed as follows:

> State entry and certification requirements, such as the Minnesota Commission's, require the filing of an application which must contain detailed information regarding all aspects of the qualifications of the would-be service provider, including public disclosure of detailed financial information, operational and business plans, and proposed service offerings. The application process can take months and result in denial of a certificate, thus preventing entry altogether... The 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... Thus, under existing [FCC] precedent [ ] Minnesota's order produces a direct conflict with our federal law and policies.

safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." R. 34; see 47 U.S.C. § 253(b) (emphasis added). The Commission determined that in order to be considered for exemption from preemption, the legal requirement in question must be "(1) 'competitively neutral'; (2) consistent with the Act's universal service provisions; and (3) 'necessary' to accomplish certain enumerated public interest goals." R. 34-35 (emphasis added).

The Commission properly determined that the state law entry adjudication requirement for CLEC entry in rural areas did not meet the standard of § 253(b). R. 35. In particular, there was no showing that addressing universal service, service quality, and consumer interests in case-by-case adjudications during competitive entry was "necessary" or "competitively neutral" when these important issues could be addressed in other forums, including industry-wide generic rulemakings. R. 35-36. This determination was reasonable and should be affirmed.

C. The RLECs Fail to Meet Their Burden of Proving Unreasonable Action or Legal Error.

The RLECs offer a half-dozen overlapping grounds seeking reversal. None has any merit, and all can be summarily rejected. Moreover, the Court should view the RLECs' failure to include the testimony and pleadings below in the Record Appendix and failure to make detailed claims of agency error based on such record as an admission that the record of proceedings below strongly supports the reasonableness of the Commission's conclusions.

1. Alleged Commission Failure to Find CLEC Harms.

The RLECs first argue that the Commission failed to find that the RSA 374:22-g and RSA 374:26 adjudicative process for rural entry materially impedes competitive entry but, instead, focused improperly on adverse impacts on the RLECs. RLEC Brief at pp. 12-14. The

RLECs disregard the text of the Order, which recites the proper legal standards in several places,[11] provides a detailed summary of the extensive factual record developed by NECTA and segTel that the multi-factor adjudication requirement to enter New Hampshire rural territories significantly impairs the ability of competitors to compete with RLECs on fair terms,[12] and repeatedly identifies as materially "inhibit[ing] or limit[ing]" competition, both individually and collectively, the mandatory litigation factors in RSA 374:22-g and the RSA 374:26 adjudicative proceeding requirement.[13]

In connection with this argument, the RLECs claim that the Commission has (1) focused "primarily on the issue of financial harm to the incumbent provider" rather than on the CLECs (RLEC Brief at p. 12), and (2) ignored public interest considerations of RSA 374:22-g, II (RLEC Brief at p. 13). The RLECs, ironically, have missed the points made repeatedly by NECTA and segTel and patently underlying the Order that (1) under the current statutory scheme, the adjudicative public good inquiry during the CLEC entry process would require a case-by-case analysis about the RLEC; (2) the extraordinary burden on CLECs of detailed consideration of competitive entry effects on the RLECs in the public good adjudications is anti-competitive; (3) several of the public interest factors directly conflict with the interests of competition elsewhere reflected in Section RSA 374:22-g, II, and federal law, and (4) public interest considerations should be evaluated in forums other than case-by-case CLEC entry hearings (e.g., the rulemaking proceeding established by the Commission per the Order at R. 36 or RLEC petitions for alternative regulatory treatment pursuant to RSA 374:3-b). The Commission's preemption ruling

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[11] See, e.g., R. 25, 28.

[12] R. 9-12, 15-20.

[13] R. 28-34.

does not "ignore[ ]" public interest considerations but, rather, reasonably rules that evaluation of each of these important policy considerations during a mandatory case-by-case review of each CLEC entry request in each rural territory would impermissibly inhibit or limit competitive entry into such territory. Instead, CLEC entry into an RLEC territory should be in the form of a non-adjudicative registration process, as is the case in the Commission's Puc 431 entry rules for non-rural territories.

The RLEC Brief also purports to see similarities between the text of RSA 374:22-g and certain federal policy provisions as a basis for arguing that RSA 374:22-g "is entirely consistent with federal law" and is not preempted. RLEC Brief, pp. 13-14 (citing 47 U.S.C. § 253(f) and 47 U.S.C. § 214(e)(1)). This argument ignores that the application of New Hampshire RSA 374:22-g and RSA 374:26 to CLEC entry requirements in a mandatory adjudication, using internally inconsistent standards and with the potential for an anticompetitive entry denial, is burdensome and anti-competitive and, therefore, contrary to federal law. Absent far more record evidence than is shown here to meet the RLECs' burden of proof, the Court should affirm the Commission's judgment that the RSA 374:22-g and RSA 374:26 process inhibits competition sufficient to justify its preemption pursuant to 47 U.S.C. § 253.

2. *Commission's Asserted Failure to Impose Competitively-Neutral Conditions on Market Entry.*

The RLECs next argue that the Commission's analysis and preemption of RSA 374:22-g as a burden on competition "fails to account for the fact that [47 U.S.C. § 253(b)] expressly permits States to impose" market entry conditions on a competitively-neutral basis. RLEC Brief at pp. 14-15. The Commission expressly stated its intention to consider appropriate, competitively-neutral conditions in the context of an industry-wide rulemaking docket to be

opened by the Commission at a later date. R. 36. The RLECs ignore the fact that establishing market entry conditions in fully adjudicated, case-by-case entry certification proceedings is not competitively neutral. Certain CLECs may be denied entry and certain CLECs may be subject to inconsistent regulatory restrictions on similar facts based on issues raised in case-by-case adjudications. It is also difficult to see how establishing precedent as to regulatory requirements for an entire industry segment based on facts presented by one CLEC at a time can possibly comport with "competitive neutrality" principles. Furthermore, nothing requires or implies that a State must impose the "competitively neutral" conditions enumerated in § 253(b) as part of a CLEC market entry process. Rather, such issues may be considered separately, as the Commission committed to doing in its Order.

3. *Claim of an "Overly Broad Brush" Approach Taken in Preempting all RSA 374:22-g Factors.*

The RLEC Brief (at pp. 16-19) challenges as overbroad the Commission's preemption finding as to the RSA 374:22-g factors. The RLECs first argue that the scheme permitted by the Order in which "lightly regulated CLECs" can compete with "a fully regulated RLEC without regard to the principles of universal service, is not 'fair and balanced.'" RLEC Brief, p. 16 (citing to preemption legal standards in Union Telephone, 160 N.H. at 321). As noted above, the Order does not ignore potential CLEC market entry impacts on RLEC universal service obligations but makes clear that examination of these issues should be addressed in a separate generic proceeding or other forum. R. 36. The Court should not second guess the policy judgment of the expert agency about the proper forum for addressing these issues.

Additionally, the RLECs argue that the RSA 374:22-g and RSA 374:26 multi-factor adjudicative process, "while not uniform among all states, is not out of the ordinary" compared

to other jurisdictions. RLEC Brief at p. 16. In addition to the RLECs' failure to specify the basis for its claims regarding other states' entry regimes in record facts justifying rejection of this argument,[14] NECTA provided a detailed refutation of the RLECs' arguments in Dr. Pelcovits' testimony and discovery responses before the Commission, which the RLECs have excluded from the Record Appendix. R. 11-12, 19-20 (summarizing NECTA's arguments). Indeed, the RLECs omit key precedent in the record of the below proceedings that is squarely on point, namely the Wisconsin Public Service Commission 2008 order finding preemption under § 253 of a state law adjudicative hearing requirement in CLEC entry proceedings. See Final Decision, Re Sprint Communications Company L.P., No. 6055-NC-103, 2008 WL 2787762 (Wisconsin Public Service Commission May 9, 2008) at *8; see also R. 25 (portion of the Order discussing the Sprint Final Decision); Union Telephone, 160 NH at 321 (citing to Sprint Final Decision). Moreover, irrespective of different rules that may apply in other jurisdictions and the manner in which those rules are actually applied by utility commissions in other states, the RLECs provide no grounds under applicable review standards to reverse the Commission's application of New Hampshire law to the facts and arguments presented by the parties in this proceeding. Furthermore, even if the limited FCC preemption case law to date generally has involved total bans on competition (RLEC Brief at pp. 16-17), the governing statutory standard for preemption remains "materially inhibits or limits" competition. See Municipality of Guayanilla, 450 F.3d at 18; Final Decision, Re Sprint Communications Company L.P., supra at *8; see also Union Telephone, 160 NH at 321 (citing Guayanilla, Sprint and In the Matter of American

[14] The Court should rule that any RLEC argument referencing but not citing non-New Hampshire regulatory schemes is not subject to review by this Court on appeal. See N.H. Sup. Ct. Rule 16(f) (including as required Brief contents, "[t]he argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon.") (emphasis added).

Communications Services, Inc., 14 F.C.C.R. 21,579, 21,616-21 (1999)). The Commission's reasonable finding that the burdensome New Hampshire state adjudicative entry process meets that preemption standard should be affirmed.

Finally, the RLECs return to their earlier argument that an asserted over-focus in the Commission's analysis on the RLEC rate of return factor in RSA 374:22-g demonstrates a lack of understanding of the adverse impacts of competition on the RLECs' ability to fund universal service and carrier of last resort obligations. RLEC Brief, pp. 17-19. Once again, the RLECs miss the Order's point that it is unlawful to apply the multi-prong requirements of RSA 374:22-g as a condition for entry of each CLEC into each RLEC territory, as it "materially inhibits or limits" competition. See Municipality of Guayanilla, 450 F.3d at 18. Accordingly, a ruling of preemption is proper. Id.

4. Alleged Failure to Limit the Scope of Preemption.

The RLEC Brief alternatively argues that even if the Commission properly found that certain aspects of the RSA 374:22-g and RSA 374:26 multi-factor adjudicative entry process are preempted, the Commission erred by ruling that all of the half-dozen factors in RSA 374:22-g are preempted just because "one of its parts conflicts with federal law." RLEC Brief, pp. 19-22. This false premise fails to acknowledge the Commission's analysis detailing the excessive burdens associated with consideration of each RSA 374:22-g factor as a precondition for CLEC entry into rural areas, as well as the Commission's review of the adverse impact of these factors collectively. See R. 28-31.

5. Alleged Violations of Competitive Neutrality.

The RLEC Brief closes with a return to the argument that the Commission's preemption analysis violates competitive neutrality principles and is internally contradictory. RLEC Brief,

pp 22-23. By the Commission's finding of preemption of RSA 374:22-g, the RLECs argue that the Commission has "consigned the RLECs to competing on an unlevel playing field" and is "discriminatory." Id., p. 23. This argument ignores that regulatory distinctions between and among competitive and incumbent providers of voice services, and between rural and non-rural incumbents, are features of federal and New Hampshire telecommunications statutes and regulations. See e.g., 47 U.S.C. §§ 251(a) and (b) (limited obligations imposed on telecommunications carriers and all local exchange carriers) and 47 U.S.C. §§ 251(c) ("Additional obligations imposed on incumbent local exchange carriers") and (f) (1) and (2) (certain exemptions from ILEC obligations for RLECs); see also e.g., Puc Rules 410 - 29 (specific to ILECs, including distinctions for non-exempt ILECs) and Puc Rules 430 - 49 (specific to CLECs).

The RLECs' argument also ignores the numerous distinctions in applicable law that favor the RLECs' marketplace interests, including (1) eligibility for and receipt of federal universal service funds pursuant to 47 U.S.C. § 254, (2) protection from certain interconnection requirements and competition pursuant to 47 U.S.C. § 251(f)(1), the piercing of which can be granted only following a comprehensive mandatory statutory inquiry conducted by the Commission, with the burden of proof falling squarely on the requesting CLEC; (3) additional protections from interconnection pursuant to 47 U.S.C. § 251(f)(2), whereby a rural LEC can "suspend or modify" its interconnection obligations, after statutory inquiry; and (4) the additional regulatory obligations that CLECs must surmount prior to even commencing operations, principally including the need to negotiate and, if necessary, arbitrate network interconnection agreements with the RLEC pursuant to 47 U.S.C. § 252.

For all of these reasons, the Commission rightly determined that the principles of competitive neutrality are not violated by its finding that the multi-pronged factors of RSA 374:22-g, II, and the adjudicative burdens of RSA 374:26 materially limit and inhibit competitive entry. The current statutory scheme operates to deprive CLECs of the opportunity to compete and New Hampshire consumers of the opportunity to benefit from robust competition in rural areas, and thereby harms the public interest. Furthermore, any RLEC concerns not resolved in a more streamlined CLEC certification process could be addressed in a generic industry rulemaking process (as committed to by the Commission in the Order at R. 36) or in other appropriate regulatory forums. The Court should affirm the Commission's reasonable determination that all of these complex issues cannot be efficiently evaluated at the time of each CLEC's request to enter the territory of each RLEC, without doing lasting damage to New Hampshire competitors and consumers and thereby burdening competition in New Hampshire.

CONCLUSION

For the reasons stated above, the Court should affirm the Commission's Order determining that the multi-factor adjudicative process for CLEC entry into rural territories required by RSA 374:22-g and RSA 374:26 is preempted by 47 U.S.C. § 253 as an impermissible barrier to the entry of a competitor or potential competitor to provide intrastate telecommunications services in an RLEC territory.

REQUEST FOR ORAL ARGUMENT

To the extent oral argument is scheduled, NECTA requests argument for it and other Appellees for a total of not less than 15 minutes before the full Court. Robert J. Munnelly, Jr. will argue for NECTA.

Respectfully submitted,

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC.

Date: May 18, 2011

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ADDENDUM

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TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
DEVELOPMENT OF COMPETITIVE MARKETS

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47 USCS § 253

§ 253. Removal of barriers to entry

(a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [*47 USCS § 254*], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers. Nothing in this section shall affect the application of section 332(c)(3) [*47 USCS § 332(c)(3)*] to commercial mobile service providers.

(f) Rural markets. It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) [*47 USCS § 214(e)(1)*] for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) [*47 USCS § 251(c)(4)*] that effectively prevents a competitor from meeting the requirements of section 214(e)(1) [*47 USCS § 214(e)(1)*]; and

(2) to a provider of commercial mobile services.

HISTORY:

(June 19, 1934, ch 652, Title II, Part II, § 253, as added Feb. 8, 1996, P.L. 104-104, Title I, Subtitle A, § 101(a), 110 Stat. 70.)

TITLE XXXIV Public Utilities
CHAPTER 374 General Regulations
Telephone Utilities Service Territories

RSA 374:22-g (2012)

374:22-g Service Territories Served by Certain Telephone Utilities.

I. To the extent consistent with federal law and notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service, subject to the jurisdiction of the commission, shall be nonexclusive. The commission, upon petition or on its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good unless prohibited by federal law.

II. In determining the public good, the commission shall consider the interests of competition with other factors including, but not limited to, fairness; economic efficiency; universal service; carrier of last resort obligations; the incumbent utility's opportunity to realize a reasonable return on its investment; and the recovery from competitive providers of expenses incurred by the incumbent utility to benefit competitive providers, taking into account the proportionate benefit or savings, if any, derived by the incumbent as a result of incurring such expenses.

III. The commission shall adopt rules, pursuant to *RSA 541-A*, relative to the enforcement of this section.

HISTORY: 1995, 147:3, eff. July 23, 1995. 2008, 350:1, eff. September 5, 2008.

TITLE XXXIV Public Utilities
CHAPTER 374 General Regulations
Granting of Permission for Extensions, New Business, etc.

RSA 374:26 (2012)

374:26 Permission.

The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.

HISTORY: 1911, 164:13. 1913, 145:13. PL 240:24. RL 289:24. *RSA 374:26*. 1961, 130:1, eff. July 17, 1961.

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

*** This document is current through March 21, 2012 ***

AGENCY Puc. PUBLIC UTILITIES COMMISSION
CHAPTER Puc 400. RULES FOR TELECOMMUNICATIONS
PART Puc 431 CLEC REGULATORY REQUIREMENTS

N.H. Admin. Rules, Puc 431.01 (2011)

PUC 431.01 REGISTRATION.

(a) No person or entity shall install or offer local exchange service in New Hampshire unless and until that person or entity is registered as a CLEC.

(b) Before commencing operations as a CLEC in New Hampshire the entity proposing to provide CLEC service shall register with the commission and receive its CLEC Authorization Number.

(c) To register with the commission a CLEC shall file:

(1) A completed Form CLEC-10 Application for Registration, described in Puc 449.07, which including the following attachments:

a. A completed Form CLEC-1 Contact Information;

b. Evidence of a surety bond pursuant to Puc 431.04 if applicable;

c. A completed Form CLEC-11 Intent to Use Uniform Tariff, if the CLEC wishes to use the uniform tariff pursuant to Puc 431.05; and

d. A rate schedule pursuant to Puc 431.06.

(d) Unless the commission denies an application for CLEC registration pursuant to Puc 431.02, it shall issue a CLEC authorization number which authorizes the applicant to provide competitive local exchange service in the territory of non-exempt ILECs.

(e) A CLEC authorized prior to the effective date of these rules shall use the commission's order number granting it authority to operate as a CLEC as its authorization number.

(f) Any authorization number obtained by a CLEC under this part shall be non-transferable.

STATUTORY AUTHORITY: *RSA 365:8* REVISION NOTE : Document #8348, effective 5-10-05, readopted with amendments Puc 400 and repealed Puc 1300 on local telecommunications competition. The readoption with amendments of Puc 400 did not include the Uniform System of Accounts for Telecommunication Companies, which remains unchanged and is exempt from *RSA 541-A* pursuant to *RSA 374:8*, II and *RSA 541-A:21*, I(q). See the Revision Note at Puc 414.01.Document # 8348 made extensive changes to the wording, format, and numbering in Puc 400, including incorporation of provisions from the former Puc 1300. Document # 8348 supersedes all prior filings for Puc 400 and Puc 1300. The filings of the Public Utilities Commission affecting the former Puc 400 include the following documents: #1828, eff 10-12-81; #2011, eff 5-4-82; #2059, eff 6-22-82; #2125, eff 8-19-92; #2549, eff 12-26-83; #2601, eff 1-24-84; #2912, eff 11-26-84; #4330, eff 10-23-87; #4341, eff 11-24-87; #4378, eff 3-1-88; #5000, eff 11-26-90; #5286, eff 11-27-91; #5616, eff 4-20-93; #5795, eff 2-28-94; #6245, eff 5-14-96; #6381, INTERIM, eff 11-27-96, EXPIRED: 3-27-97; #6512, eff 5-21-97; #6527, INTERIM, eff 6-25-97; #6591, eff 9-30-97; #6776, eff 6-24-98; #7200, eff 2-10-00; #7283, eff 5-23-00; #8255, eff 1-13-05The filings of the Public Utilities Commission affecting the former Puc 1300 include the following documents: #2534, eff 11-23-83; #6392, eff 12-4-96; #7283, eff 5-23-00; #7692, eff 5-25-02; #8213-A, INTERIM, eff 11-23-04

Source. #8348, eff 5-10-05 (See Revision Note at chapter heading for Puc 400)