STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 10-183

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

MOTION FOR REHEARING

NOW COME Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc. and Granite State Telephone, Inc., each a rural local exchange carrier and a rural telephone company (together, the "RLECs"), and respectfully move for rehearing of the Commission's Order No. 25,277 dated October 21, 2011 (the "Order").

I. BACKGROUND

The Order was issued on remand from the Supreme Court in *Appeal of Union Telephone Company d/b/a Union Communications,* 160 N.H. 309 (2010) (*Union Telephone*). The Court held that the Form CLEC-10 registration process for competitive local exchange carriers, contained in the Commission's rules, N.H. Code of Admin. R. Puc 431.01, was not valid in the service territories of the RLECs. Instead, the Court held that New Hampshire law, specifically RSA 374:22-g and RSA 374:26 required the Commission to conduct an inquiry regarding the public good considerations prescribed in RSA 374:22, II. However, the Court conceded that federal law may preempt state law requirements and accordingly remanded the matter to the Commission to determine whether state law is preempted by federal law.

In its Order, the Commission held that the state statutes were indeed preempted by federal law, particularly Section 253(a) of the Communications Act. The Commission did acknowledge the savings clause of Section 253(b), which provides that the state may "impose, on

a competitively neutral basis and consistent with section 254 of this title, 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." Emphasizing the importance of competitive neutrality, the Commission found that state statutes did not meet this standard, explaining that these statutes focus on the effect that competitive entry has on the incumbent. It further noted that to impose requirements on a "competitively neutral" basis, such requirements would necessarily be of general applicability to all telecommunication service providers in the state, and thus would properly be imposed by administrative rule, rather than an adjudicated process on a case-by-case basis.[1] Accordingly, it resolved to commence a rulemaking "to address, in a competitively neutral manner, whether additional or modified requirements are 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 in the context of competitive entry." In the interim, the Commission has decided to resume acceptance of Form CLEC-10 registrations, and to validate the statewide certifications of segTEL and Access Plus Communications.

II. STANDARD OF REVIEW

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion."[2] The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings.[3] To prevail on a motion for rehearing, a moving party must demonstrate that an

---

[1] Order at 35.
[2] RSA 541:3
[3] *See Dumais v. State*, 118 N.H. 309, 312 (1978). *See also Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal

administrative agency's order is unlawful or unreasonable.[4] For the reasons discussed below, the RLECs respectfully submit that the Commission has unnecessarily relinquished its authority to preserve universal service by allowing unconditional entry of competitors in violation of the principles of competitive neutrality. As such, the Order is unlawful and unreasonable, and good cause exists for rehearing.

III. THE ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE OF ERRORS IN THE COMMISSION'S PREEMPTION ANALYSIS.

A. General Preemption Issues

As an initial matter, the Commission misinterpreted the extent to which federal law may preempt a state statute. In the Order, the Commission concluded that "the list of items to be considered by the Commission is not severable, either as a complete list, or as individual items, and consideration of all items must be preempted. . . . Thus, the Commission is required to consider all items enumerated by the legislature and the preemption of one would appear to impact all."[5] However, not only is this position the opposite of settled law, it violates the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."[6] As the U.S. Supreme Court further explained, "[i]n a pre-emption case . . ., state law is displaced only to the extent that it actually conflicts with federal law. . . ."[7] "The rule is that a federal court should not

---

to court is filed).

[4] *See* RSA 541:3; RSA 541:4; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.,* Order No. 25,194 at 3 (Feb. 4, 2011).

[5] Order at 30.

[6] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985).

[7] Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996) (internal citations omitted).

extend its invalidation of a statute further than necessary to dispose of the case before it."[8] Thus, it was unreasonable for the Commission to have approached its analysis with the belief that any defect in the state statute rendered it void in its entirety.

In addition, the Order assumes that the market barriers prohibition is unconditional and it ignores, for all practical purposes, the fact that Section 253 permits conditions on its face. "Because we are preempted by federal law from answering [the public good] inquiry in the negative, [we] *must* allow competitive provisioning of telecommunications services in all areas of the state regardless of the Commission's consideration of any of the factors in RSA 374:22-g, II . . . ."[9] In support of this position, the Commission asserted that Congress has categorically decided the issue of public good. "In enacting this federal statute, Congress determined that it is for the public good to allow more than one carrier to operate in any territory."[10] However, considering the savings clauses of Section 253(b) and (f), Section 253(a) cannot be considered the final word regarding "public good" for purposes of RSA 374:22-g. Both Congress and the legislature have determined that the public good may involve conditions on the entry of competitors into the market, and it is reasonable to presume that the Commission would have to conduct a hearing on whether a potential entrant meets those conditions.

The Commission failed to recognize that while it may not prohibit market entry outright, it may impose competitively neutral conditions on market entry in the interest of the public good. To the extent that a competitive provider is discouraged from entering the market on account of these conditions, this is a business decision, not a prohibition, and does not merit preemption.

---

[8] *Id.*, 516 U.S. at 476 (quoting Brockett v. Spokane Arcades, Inc.).
[9] Order at 32 (emphasis original).
[10] *Id.* at 33.

As the RLECs explained in their briefs, Section 253 does not require that the Commission abdicate its responsibility under state law. Section 253(b) permits the Commission to impose requirements to protect universal service in general:

> (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, 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.

Section 253(f) also permits the Commission to impose related conditions:

> (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) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.

The FCC has explained that if "the challenged law, regulation or requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation."[11] Furthermore, "irrespective of subsection (a), states retain authority to impose on carriers the types of requirements specified in subsection (b) provided that such measures satisfy the criteria set forth in that subsection."[12]

The Commission disagreed that this principle applies in this case, maintaining that "there is nothing to indicate that the factors set out in the statute otherwise comport with the requirements of the statute that the regulations are consistent with the Act's universal service

---

[11] *Petitions for Declaratory Ruling and/or Preemption*, CCBPol 96-13, Memorandum Opinion and Order, 13 FCC Rcd 3460 ¶ 42 (1997) (citing *Silver Star Telephone Company Petition for Preemption and Declaratory Ruling*, CC Docket No. 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639 ¶ 37 (1997) (finding that "[i]f a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). If, however, the challenged law, regulation or requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation."

[12] *Id.* ¶ 43.

provisions or are necessary to accomplish the goals set out in section 253(b)."[13] However, this is inaccurate. The factors are clearly related to those in Section 253(b), as well as Section 253(f). Both the federal and state statutes *expressly* invoke universal service as a consideration. Furthermore, Section 253 also provides for considerations of carrier of last resort obligations. Section 253(f) involves ETC status, which implies carrier of last resort, and RSA 374:22-g expressly invokes carrier of last resort obligations.

The Wisconsin commission, with which the Commission believes it is in accord,[14] recognized this distinction. As the RLECs reported in their Reply Brief, "[it is] state policy to maximize competition, but only as consistent with other stated public interest goals - which could be other [statutory] factors . . . ."[15] However, notwithstanding the latitude that Section 253 grants it, the Commission unreasonably presumed that Section 253 imposes an unconditional mandate for competitive entry. Its analysis was conducted through this lens, and resulted in a decision that does not comport with the law.

B. Specific Preemption Issues

In the Order, the Commission determined that the central question was 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."[16] In conducting its inquiry, the Commission examined each of the factors in RSA 374-22g, II, which provides that:

> 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

[13] Order at 35.
[14] *Id.* at 25.
[15] RLECs Reply Brief at 11.
[16] Order at 27-28.

> 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.

The Commission concluded that each and every one of these factors acts to prohibit the entry of a competitor. However, the Commission erred in respect to all of these factors.

1. Competition

The Commission dispensed with the competition factor by stating that RSA 374:22-g prohibits regulations that prohibit any entity from offering services, and it asserted that the RLECs' had conceded this point.[17] However, the Commission failed to convey the entirety of the RLECs' observation – that RSA 374:22-g manifests a public policy that competition is a public good, *under certain conditions* that include preservation of universal service and carrier of last resort obligations in a fair and balanced legal and regulatory environment.[18] The regulatory scheme that the Commission established in the Order fails to meet these criteria. The proper standard, as dictated by the Court, is whether a state law "materially inhibits or limits the ability of *any competitor* or potential competitor to compete in a *fair and balanced* legal and regulatory environment."[19] It should be noted that this standard does not involve limits on competitive carriers. It involves *any* competitor, which includes the RLEC. The process established by the Order, which allows lightly regulated competitors to compete with a regulated RLEC without regard to the principles of universal service is not "fair and balanced."

The Commission's misinterpretation of this factor is best illustrated in its holding that "[t]he statute requires consideration of the impact on the incumbent from the presence of

---

[17] *Id.* at 28, citing RLECs Reply Brief at 8.
[18] RLECs Reply Brief at 3, 8.
[19] Union Tel. Co., 160 N.H. at 321 (emphasis supplied).

competition."[20] However, this is not what the statute says. It simply states that "[i]n determining the public good, the commission shall consider the interests of competition . . . ." It does not say "the interests of the RLEC," and it does not say the "interests of competitors," it says the "interests of competition," a general concept that involves the marketplace as a whole and applies to all carriers. Put another way, while it may be in the interests of new *competitors* for unbalanced regulatory obligations to drive the ILEC out of the market, it is not necessarily in the best of interest of *competition* as a whole. The RLECs respectfully submit that the Commission should reconsider this issue in that light.

2. Rate of return and recovery of expenses

RSA 374:22-g provides that the Commission shall consider "the incumbent utility's opportunity to realize a reasonable return on its investment." Without explaining its reasoning, the Commission interpreted this factor as a prohibition against "financial harm" to the ILECs.[21] Having adopted this interpretation, it then posits an "absurd" scenario in which "adept competitors, who might take significant business away from the incumbent, would be barred from competing."[22] This is indeed an absurd result, and one that is at odds with reality. A more plausible scenario is that adept competitors, who might take the most profitable business away from the incumbent, would cause the failure of universal service. The Commission waved this concern away, explaining that "[f]inancial harm that may be experienced by the incumbent can be addressed through a rate case."[23] This conclusory statement is unsupported in the record and illogical. Its practical meaning is that financial harm can be addressed by permitting the RLECs

[20] Order at 35.
[21] *Id.* at 29.
[22] *Id.*
[23] *Id.*.

to raise their rates, but this overlooks the fact that increased rates cannot be sustained in a competitive environment.

The issue is not about "financial harm" to the RLECs, a phrase that conjures an image of mere lost profits. As the RLECs repeatedly explained in their briefs and testimony, rate of return considerations relate directly to the RLECs' ability to meet their carrier of last resort and universal service obligations. This obvious concern is clearly addressed in Section 253(b), which provides that the Commission can impose entry 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." Furthermore, Section 253(f) provides that it can condition market entry on "meet[ing] the requirements in Section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service." Although the Commission may maintain that "[t]he threat of financial harm cannot serve to deny entry to competitors,"[24] the threat to universal service can definitely serve to condition competitive entry on conformance with Section 253. The RLECs respectfully submit that the Commission should reconsider this issue in that light.

3. Fairness

The Commission's analysis touched on the fairness factor, explaining that "it is not clear whether we are to make that assessment from the perspective of the RLEC, the potential competitor, the consuming public, or some combination of them."[25] Fearing that it might apply this factor in a way that runs afoul of federal law, it thus held that this consideration is preempted.

---

[24] Order at 29.
[25] *Id.* at 30.

The RLECs submit that this inquiry is not so complex as it may appear, given that the Supreme Court has already provided some guidance. In *Union Telephone*, the Court sounded the refrain that the question, as affirmed by the FCC and federal courts, is whether a state law "materially inhibits or limits the ability of any competitor or potential competitor to compete in a *fair* and balanced legal and regulatory environment."[26] In fact, this standard is embodied in the Commission's own brief discussion of fairness, which incongruously preempts the "fairness" consideration on the grounds that violates principles of fairness in competition.[27] While this standard of fair and balanced competition might not encompass all of the considerations that the legislature intended for a "fairness" inquiry, it is certainly a reasonable and obvious starting point. Furthermore, it is directly related to the principles of competitive neutrality that form the foundation of the Order. However, rather than examining this issue in depth, the Commission established a regulatory scheme of indeterminate length that is not fair and balanced and which undermines the principles of universal service and carrier of last resort. The RLECs respectfully submit that the Commission should reconsider this issue in that light.

4. Universal service and carrier of last resort

In the Order, the Commission described the intersection of RSA 374:22-g and Section 253(b), finding that the federal concerns over the preservation of universal service and ensuring the quality of telecommunications services (over which the Commission retains authority) equate to the RSA 374:22-g considerations regarding universal service and carrier of last resort obligations.[28] However, nothing in RSA 374:22-g, or all of Title 34 for that matter, requires that universal service obligations attach solely to any particular carrier or carriers, nor does it

[26] Union Tel. Co., 160 N.H. at 321 (emphasis supplied).
[27] Order at 30.
[28] *Id.* at 31.

prescribe how this function should be accomplished. It merely requires that the Commission consider the issue in light of its overall mission. In a fair and balanced competitive environment, universal service should be preserved in a manner that does not disadvantage one competitor over another. However, the Order does just that, imposing these obligations on only one carrier. The Commission justified this by explaining that Section 253 does not allow the states to prohibit competitive entry out of concern over universal service or carrier of last resort obligations,[29] but nothing in Section 253 prevents the Commission from addressing these concerns by imposing conditions on market entry. Indeed, while Section 253 provides that states *may* impose requirements necessary to preserve universal service, the legislature, under the authority granted to it by Section 253, has determined that the Commission *must* impose such requirements. However, it has not done so, leaving the RLECs at a competitive disadvantage. The RLECs respectfully submit that the Commission should reconsider this issue in that light.

IV. THE ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE IT IS NOT COMPETITIVELY NEUTRAL.

In the final portion of the Order, the Commission conceded that "Section 253(b) permits a state to 'impose, *on a competitively neutral basis* and consistent with section 254 of this title, 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.'"[30] (It still ignored Section 253(f), which also addresses carrier of last resort obligations and universal service by conditioning market entry on ETC status.) Further, the Commission affirmed the FCC holding that "the term competitively neutral require[s] competitive neutrality among the *entire universe of participants* and potential participants in a

[29] Order at 31.
[30] *Id.* at 34 (emphasis supplied).

market,"[31] and offered its own conclusion that "[i]n order for the Commission to impose requirements on a 'competitively neutral basis' . . . such requirements would necessarily be of general applicability to all telecommunication service providers in the state . . . ."[32] Thus, just as the Section 253 acts against any state requirement that unduly favors the ILEC, it also acts against any requirement (or lack thereof) that favors the CLEC at the expense of the ILEC.

However, having correctly described the broadly inclusive standard for competitive neutrality, the Commission proceeded to contradict this holding, and undermine the basis of the Order, by establishing a regulatory scheme that is not competitively neutral among the universe of players. By inviting petitions for entry into RLEC markets under the same conditions as non-RLEC markets, it consigned the RLECs to competing on an unlevel playing field. RLECs will continue to be subject to carrier of last resort obligations, universal service obligations, rate regulations, and other ILEC specific regulatory burdens, while any competitor is free to cherry pick high performing customers in the territory.

The Commission appeared to defend this course by citing the holding in *Nevins* that "promulgation of a rule pursuant to the APA rulemaking procedures is not necessary to carry out what a statute demands on its face."[33] But this is distinguished from Nevins in that this statute does not "demand" unfettered market entry "on its face." Just the opposite is true. Unfettered market entry is a conclusion teased out by the Commission only upon analysis of the purported contradictions of the state statute with a federal statute. This is not suitable grounds to establish

---

[31] *Id.*at 35, citing Silver Star Telephone Company, 13 FCC Rcd 16356 at ¶ 10.
[32] *Id.*. This is also in accord with the FCC, which has also emphasized that the requirements of competitive neutrality cut both ways. In the *Hyperion* Order, it clarified that "a state legal requirement would not as a general matter be 'competitively neutral' if it favors incumbent LECs over new entrants (*or vice-versa*)." *Hyperion of Tennessee, L.P. Petition for Preemption*, Memorandum Opinion and Order, 14 FCC Rcd 11064 ¶ 16 (1999) (emphasis supplied).
[33] Order at 36, citing *Nevins v. N.H. Dep't of Resources and Economic Dev.*, 147 N.H. 484, 487 (2002).

a discriminatory scheme that will have devastating effects on the statutory factors of universal service and carrier of last resort obligations. By allowing unconditional market entry before any rulemaking, the Commissions violates the principle of competitive neutrality on which the Order is based.

WHEREFORE, for the reasons contained herein, the RLECs respectfully request that the Commission reconsider Order No. 25,277 and

(a) find that RSA 374:22-g and RSA 374:26 are not preempted by federal law,

(b) find that competitive carriers may not obtain authorization to provide services on a statewide basis absent in inquiry in conformance with RSA 374:22-g and RSA 374:26, and

(c) rescind the statewide authority of segTEL and Access Plus Communications.

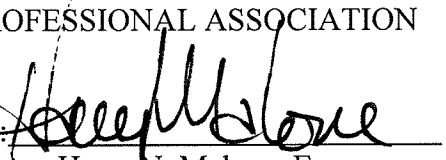
Respectfully submitted,

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

By Their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: November 3, 2011

By: 

Harry N. Malone, Esq.
111 Amherst Street
Manchester, NH 03101
(603) 695-8532
hmalone@devinemillimet.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing initial brief was forwarded this day to the parties by electronic mail.

Dated: November 3, 2011

By: _____
Harry N. Malone, Esq.