STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

OPPOSITION OF NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION TO RURAL TELEPHONE COMPANIES' MOTION FOR REHEARING

Introduction

The New England Cable and Telecommunications Association, Inc. ("NECTA") respectfully opposes the November 3, 2011 Motion for Rehearing filed by Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc., and Granite State Telephone Company, Inc. ("RLECs" and "RLECs' Motion"). The RLECs' Motion argues that the Public Utilities Commission ("Commission" or "PUC") should reconsider its October 21, 2011 Order No. 25,277 ("Order"), that preempts pursuant to federal law, 47 U.S.C. § 253, the New Hampshire competitive local exchange carrier ("CLEC") entry statute for rural areas (RSA 374:22-g, II) and the application of the adjudicative hearing requirement (RSA 374:26) to rural entry requests. As the Order was both lawful and reasonable, as required by RSA 541:3 (rehearing granted only upon "good reason") and 541:4 (petitioners must prove that an Order is "unlawful or unreasonable"), the Commission should deny the Motion.

Argument

The Order ended years of regulatory and court proceedings involving NECTA, its New Hampshire members, and several CLECs relating to rural entry.[1] All struggled

[1] Relevant dockets in addition to the instant docket included Comcast's 15 month effort to enter the TDS territory, Docket 08-013; MetroCast's 18 month effort to enter Union territory, Docket 08-130, and Union's

with New Hampshire's unique and burdensome CLEC entry scheme.[2] New Hampshire statutes required the Commission to consider, in making a public good finding through a full adjudicative proceeding (unless waived by the affected RLEC), a half-dozen wide ranging issues with respect to each and every CLEC seeking to enter each and every RLEC territory in the State of New Hampshire. See RSA 374:22-g, II (requiring consideration of factors including "fairness; economic efficiency; universal service; carrier of last resort obligations; the incumbent utility's opportunity to realize a reasonable return on its investment..."); RSA 374:26 (requiring adjudicative "due hearing" for CLEC entry requests, among other forms of proceedings); and see also Union Telephone Decision, 160 N.H. 309 (confirming that the above statutes operate to require an adjudicative hearing unless voluntarily waived by the RLEC).

Following a detailed analysis, the Commission issued the Order and concluded that this costly and time consuming process for CLECs to enter rural territories constituted a prohibited entry barrier pursuant 47 U.S.C. § 253(a) that was not "saved" by the reservation of authority in 47 U.S.C. § 253(b) for states to impose "on a competitively neutral basis" regulations applicable to universal service, public safety, service quality and consumer rights. See Order at 25-35. Given the Order's finding that addressing § 253(b) reserved rights through the CLEC entry process was not competitively neutral, the Order stated the intent to commence a rulemaking to consider whether additional or modified regulatory requirements are needed at this time and

---

State Supreme Court appeal of the MetroCast entry order, Appeal of Union Telephone Company d/b/a Union Communications, 160 N.H. 309 (2010) (hereinafter "Union Telephone Decision"); MetroCast's 14 month effort to obtain an interconnection agreement with Union, Docket 09-048; the remand proceeding relative to MetroCast's CPCN, Docket 08-130 (resolved by agreement); CRC Communications of Maine d/b/a Time Warner's entry request into Northland territory, Docket 10-213; and the RLEC Petition Regarding the CLEC Registration of segTel, Inc., Docket 09-198 (closed in favor of instant docket).

[2] See Pelcovits Rebuttal Testimony at 2-7 (discussing less restrictive entry requirements in other states).

established a process for addressing CLEC entry requests prior to completion of such rulemaking. Order at 36-37. This Order's analysis and findings are in full accord with applicable laws and are reasonable; therefore, the Order should be affirmed.

The RLECs' Motion fails to provide a "good reason for the rehearing." See RSA 541:3 (rehearing requirements). The RLECS' Motion principally rehashes the RLECs' argument that by failing to address universal service and other RSA 374:22-g factors "the Commission has unnecessarily relinquished its authority" in violation of competitive neutrality principles. RLECs' Motion at 3 and quoting id., at 4 ("The Commission has failed to recognize that....it may impose competitively neutral conditions on market entry in the interest of the public good"). This argument is unpersuasive for two reasons. First, nearly all states have limited the CLEC entry process to ensure that the CLEC is qualified to operate in the state. See Pelcovits Rebuttal Testimony at 2-7. Second, while the Commission has determined that consideration of these broader issues is preempted in a CLEC registration process (see Order at 29-35), the Commission has not "relinquished" its ability to address these issues, to the extent necessary or appropriate, in other forums such as utility agency rulemakings, generic investigations or petitions seeking regulatory relief. See Order at 12 and NECTA Initial Brief at 21.[3]

Ample alternative forums exist for the RLECs to raise to the Commission the policy issues they claim are at issue in this proceeding. The Commission already has agreed to commence a rulemaking proceeding to consider additional regulatory requirements as a result of the order of preemption, and appropriate changes can be

[3] RLECs are further protected by 47 U.S.C. §§ 251(c) and (f) that require a separate Commission proceeding in the event an RLEC is asked to "unbundle" its facilities. See 47 U.S.C. §§ 251(c) and (f) and Pelcovits Initial Testimony at 7.

argued for in that forum. Order at 37.[4] Additionally, if an RLEC is particularly affected by competitive entry, it can petition for specific relief from the Commission under its general regulatory authority or file a plan for alternative regulation pursuant to RSA 374:3-a. Accordingly, the RLECs' Motion is simply incorrect in asserting that the Commission has "relinquished" its regulatory authority. Rather, it has followed the lead of many other states in removing these broad and procedurally complex issues from the CLEC by CLEC, rural territory by rural territory, adjudicative hearing process that has impermissibly burdened competitive entry in New Hampshire rural territories for many years. As argued by NECTA in the underlying proceeding:

> [t]he presence of regulatory policy issues associated with the development of competition in rural areas should not be addressed piecemeal in each and every CLEC registration request as it would be duplicative and a waste of resources to consider these issues on a case-by-case basis for each CLEC application and will cause limits on or delays in the availability of new service options for rural customers.

NECTA Initial Brief at 4.

Additionally, the RLECs' Motion walks through the specific factors in RSA 374:22-g to attempt to argue that consideration of each of these issues in a mandatory RSA 374:26 adjudicative hearing proceeding would not be sufficient to merit preemption. RLECs' Motion at 6-11. These arguments ignore or underplay the significant burdens associated with full litigation of each of these issues in each CLEC entry request and in each rural territory and ignore the Commission's ability to address the policy issues raised by each factor in other forums, to the extent necessary or

---

[4]. Indeed, in the Order the Commission stated that it would open a rulemaking that "will 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..." Id. at 36.

appropriate. See id. The RLECs' Motion concludes by contending that allowing CLECs to enter rural territories under the same conditions as non-rural markets will "consign[] the RLECs to competing on an unlevel playing field...[in light of their] 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." Id. at 11-13.

The RLECs' "cherry picking" argument suffers from numerous and fundamental flaws. First, this issue was already raised by the RLECs in the Direct Testimony of Meredith Douglas at 15 – 16 and in no way does the RLECs' attempt to reargue it provide "good cause" for rehearing.[5] Second, their portrayal of the "unfairness" of competition ignores the many advantages that the RLECs receive as the incumbent in the market, including receipt of federal universal service funds (which the Federal Communications Commission ("FCC") has recently determined will continue to provide especially generous funding to rural carriers) and the advantage of ubiquitous, in-place networks, whose value has mostly been paid for already by the ratepayer. Third, there are no fundamental differences between the RLECs' situation and the non-RLEC incumbents in terms of the threat of so-called "cherry picking." Indeed, a key stated objective of the FCC's just announced (but not yet released) universal service fund ("USF") reform Order is to target subsidies to the specific geographic areas of all ILECs that are very costly to serve, thereby recalibrating USF subsidies in the newly

---

[5] "From this I conclude that, just as the Section 253 acts against any state requirement that unduly favors the ILEC, it would also act against any requirement (or lack thereof) that favors the CLEC at the expense of the ILEC. An example of this kind of reversal, which I allude to later in my testimony, is the situation in which a new entrant is permitted to selectively market into a particular territory while at the same time the RLEC is bound by rate-averaged carrier of last resort obligations."

competitive world faced by all ILECs. Finally, the RLECs ignore the aforementioned plan by this Commission to open a rulemaking docket to consider possible regulatory scheme changes relating to universal service and other policy issues. RLECs fail to explain why these issues should not be addressed separately, rather than in a piecemeal, duplicative, and costly fashion at the entry point for each and every CLEC.

Conclusion

For the reasons discussed herein and in the underlying proceeding, New Hampshire law expressly provides that certification of new entrants is to be nonexclusive, and the Commission properly and reasonably ruled that the excessively burdensome RSA 374:22-g and RSA 374:26 adjudicative hearing process for each CLEC entry request into rural areas constituted an impermissible entry barrier pursuant to 47 U.S.C. § 253. Accordingly, NECTA respectfully requests that the Commission deny the RLECs' Motion for Rehearing.

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC.

By its attorneys,

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

and

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

DATE: November 10, 2011