

**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

**REBUTTAL TESTIMONY OF  
MICHAEL D. PELCOVITS**

**ON BEHALF OF**

**NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION,  
INC.**

December 8, 2010

1 **I. INTRODUCTION AND SUMMARY**

2 **Q. Please state your name, occupation, and business address.**

3 **A.** My name is Michael D. Pelcovits. I am a principal with the economic consulting  
4 firm of Microeconomic Consulting and Research Associates (“MiCRA”). My  
5 business address is 1155 Connecticut Avenue, N.W., Suite 900, Washington, D.C.  
6 20036.

7 **Q. Did you file direct testimony in this case?**

8 **A.** Yes. I filed direct testimony in this case on October 22, 2010 on behalf of New  
9 England Cable and Telecommunications Association, Inc.

10 **Q. What is the purpose of your rebuttal testimony?**

11 **A.** My rebuttal testimony will respond to several statements and claims made by Mr.  
12 Douglas Meredith on behalf of Granite State Telephone, Inc., Dunbarton  
13 Telephone Inc., Bretton Woods Telephone Company, Inc., and Dixville  
14 Telephone Company (collectively, the “Rural Incumbent Local Exchange  
15 Carriers” or “RLECs”). Specifically, I will address three topics. First, I will  
16 discuss whether the requirements imposed by other state commissions that were  
17 cited by Mr. Meredith are comparable to the RSA 374:22-g and 374:26  
18 requirements at issue in this proceeding. Second, I will address Mr. Meredith’s  
19 mischaracterizations of the economic situation faced by competitive local

1 exchange carriers (“CLECs”) when entering rural markets and how Mr.  
2 Meredith’s proposals for additional impediments on CLECs would further  
3 constrain their ability to offer competitive telephone services. Third, I will  
4 address Mr. Meredith’s argument for conditioning CLEC entry on the potential  
5 effect of entry on the RLECs’ financial condition.

6 **II. REVIEW OF OTHER STATES’ CERTIFICATION REQUIREMENTS**

7 **Q. What conclusion does Mr. Meredith draw from his review of the certification**  
8 **requirements imposed by other states?**

9 **A.** Based on his review of certification requirements in 26 states, Mr. Meredith  
10 concludes that “the stipulated provisions in this proceeding as well as the standard  
11 for review under the [New Hampshire] state law fall within the ambit of  
12 reasonable policy directives assessed by other state commissions.”<sup>1</sup>

13 **Q. Do you agree that Mr. Meredith’s conclusion is warranted?**

14 **A.** No. I have reviewed the supporting material provided by Mr. Meredith (Exhibit  
15 DDM-01 to the Meredith PFT) focusing on the provisions from eight states that  
16 he highlights on pages 9 and 10 of his testimony. (These states are Connecticut,  
17 Vermont, Alabama, Georgia, Kentucky, North Carolina, Ohio, and South  
18 Carolina.) Mr. Meredith cites to fifteen specific laws or regulations in response to

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<sup>1</sup> Direct Testimony of Douglas Meredith (hereafter, “Meredith PFT”) at 10.

1 a discovery request propounded by NECTA.<sup>2</sup> I have reviewed the documents  
2 supporting each of these cited examples.

3 Contrary to Mr. Meredith's conclusion, I did not find any support for the  
4 far reaching claim that the other states cited in his testimony impose requirements  
5 comparable to New Hampshire's requirements, which, in my opinion, constitute  
6 significant entry barriers to CLECs wishing to enter local exchange markets. Mr.  
7 Meredith's evidence and assertions suffer from important deficiencies. Most  
8 notably, the material provided by Mr. Meredith consists of CLEC application  
9 forms and state orders, rather than an analysis of the actual practices and  
10 procedures that these states follow in the course of determining whether a CLEC  
11 should be granted authorization. It is unwise to draw parallels between an  
12 ambiguous line or two in another state's order or regulations and the detailed  
13 requirements spelled out in the parties' stipulation in this case. It is even more  
14 misguided to ask this Commission to compare its own processes and procedures  
15 to these brief citations from other states' orders and forms used to process CLEC  
16 applications. This Commission knows the extent of discovery and evidence  
17 required in a contested proceeding in this state, and the documentation provided  
18 by Mr. Meredith contains none of the detail that would give the Commission any  
19 comparable insight into the practices and procedures followed by other states.

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<sup>2</sup> Response to NECTA-RLECS 1-1.

1 **Q. Would you provide some examples of the “evidence” used by Mr. Meredith**  
2 **to demonstrate that there are parallels from other states to the New**  
3 **Hampshire requirements?**

4 **A.** Yes. A large number of the requirements cited by Mr. Meredith deal with  
5 provisions that are vastly different in breadth and scope to the entry requirements  
6 at issue here. Of the fifteen provisions cited by Mr. Meredith, seven deal with  
7 requirements to post a surety bond, to file a business plan, or to file a disaster  
8 recovery plan. In and of themselves, these types of requirements are not  
9 necessarily unreasonable or excessively burdensome. Two other provisions deal  
10 with the need to secure interconnection agreements with an incumbent, which is a  
11 necessity for all CLECs to obtain in order to provide service, but is separate and  
12 apart from state authorization to offer service.

13 The reference to Kentucky as a supportive jurisdiction is, frankly,  
14 mystifying. Kentucky allows new entrants to use a streamlined application  
15 process, and states that “[t]he lack of market power of CLECs and wireless  
16 carriers, together with the availability of competitive choices, makes it reasonable  
17 to require only a proposed tariff with 30 days’ notice to the Commission and a  
18 cover letter setting forth certain information prior to CLEC or wireless entry into  
19 the Kentucky market.”<sup>3</sup>

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<sup>3</sup> Commonwealth of Kentucky, Public Service Commission, *Order*, In the Matter of Exemptions for Providers of Local Exchange Service Other than Incumbent Local Exchange Carriers, Administrative Case No. 370, January 8, 1998, at 3 (Meredith PFT, Exhibit DDM-1, 000364).

1           Massachusetts is a noteworthy example of a jurisdiction that processes  
2           CLEC requests in the form of a non-adjudicative Statement of Business  
3           Operations that is not publicly noticed, assigned a docket number, nor is the  
4           launch of a CLEC's operations even subject to a written decision.<sup>4</sup> These statutes  
5           and regulations prove the opposite of Mr. Meredith's assertion that other states  
6           impose similar requirements to those applicable under New Hampshire law for  
7           entry into RLEC territories.

8           Based on my review, only five provisions of the original fifteen offered by  
9           Mr. Meredith may have a closer relation to the entry requirements at issue in this  
10          proceeding. On further examination, however, these provisions are not supportive  
11          of Mr. Meredith's claim that the proposed procedures for CLECs in New  
12          Hampshire would be in the "ambit of reasonable policy directives assessed by  
13          other state commissions."

14       **Q.    Please explain what Mr. Meredith provided in regard to the potentially**  
15       **similar provisions in these five other states?**

16       **A.    I will list the five individual states below, the provision that Mr. Meredith**

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<sup>4</sup> See DD 417-23 of Exhibit attached to Meredith PFT. The Exhibit also includes the Massachusetts procedural rules applicable to adjudicative proceedings (see DD 424-441) but does not explain how those procedural rules apply to non-adjudicative SBO applications. Additionally, Rhode Island (a state enumerated on Mr. Meredith's broader list of states) has virtually the same non-adjudicative review and approval process as Massachusetts except that a docket number is assigned by the Commission. See generally DD 582-607 (Rhode Island entry application); see also DD 590 (concluding paragraph of 1996 order establishing entry requirements) stating that the Commission is "committed to competition in telecommunications. We believe that removing barriers and encouraging new entrants will result in lower costs to customers. These **minimal entry requirements** for CLECs will allow competitive local exchange service to commence. How it is to be managed raises issues, including the applicability of quality of service standards and universal service standards, which we will address in Docket No. 2252..." (emphasis added).

1 identified as noteworthy for comparison to the instant case, and then cite to the  
 2 specific language in the material provided by Mr. Meredith in response to the  
 3 NECTA discovery request.

4 State Identified Issue Language

Connecticut	State Goals	Applicant must explain how issuance of a CPCN will satisfy goals of the Statute, including ensuring the universal availability and accessibility of high quality affordable telecommunications services to all
Vermont	General Public Good	A company wishing to provide telecommunications service in Vermont must first obtain a Certificate of Public Good from the Public Service Board. The PSB issues CPGs only upon finding that the operation of the telecommunications business will serve the general good of the state
Alabama	Non-RBOC Provision	No certificates to be issued until three years after the Commission Order (1995);  Commission reserves the right to authorize competition in any area served by an ILEC (other than the RBOC successor – now AT&T) provided that the Commission conduct formal proceedings on its own motion or if requested by an interested party, and the ILEC is allowed to complete rate rebalancing on an accelerated schedule
North Carolina	Service of Application to affected LECs	Requires that application be served on each of the LECs that provide local exchange service in North Carolina
South Carolina	Rural Stipulation	Stipulation by one CLEC to not provide service in a rural ILEC's service area without further proceedings

5 Based on my review of the documents provided by Mr. Meredith  
 6 supporting the requirements summarized above, there is virtually no support for  
 7 his contention that these other states engage in the procedure envisioned in the

1 stipulation and pursuant to New Hampshire statutes to review in great detail the  
2 effect of entry on the ILEC's financial well-being. Requiring a detailed  
3 application that is reviewed and approved by the agency without the necessity of  
4 prefiled testimony, adjudicative hearings or briefs, as is the case in Connecticut  
5 and Vermont, imposes far fewer burdens than the New Hampshire process.<sup>5</sup> This  
6 Commission already has agreed during the MetroCast appeal to notify the local  
7 RLEC of all CLEC entry requests (such as is the case in North Carolina), and Mr.  
8 Meredith has not cited to anything to suggest that the CLEC applications process  
9 there is not streamlined.<sup>6</sup> Alabama, therefore, remains as the only state in which  
10 Mr. Meredith's assertion is not readily dismissed. However, it is not possible to  
11 infer whether Alabama has imposed costly entry requirements without a full  
12 investigation of the entry process or telecommunications regulatory scheme in  
13 Alabama<sup>7</sup>

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<sup>5</sup> Connecticut has an on request hearing requirement in CLEC entry cases but the local ILECs do not request them and the Connecticut Commission has not deemed one necessary for at least a decade. Moreover, the Vermont Commission's "Frequently Asked Questions" relative to telecommunications certificates (attached as page DD 752 to the Meredith PFT) states that routine applications are typically processed within three months. See also e.g., Vermont Public Service Board Order, CPG NO. 916-CR, Petition of American Dial Tone, Inc., for a certificate of public good (March 25, 2010) (granting certificate without a hearing "[b]ased upon the Registration Form and accompanying documents....").

<sup>6</sup> See N.C. Admin. Code R17-02b(7) simply requiring that applications be served on local exchange carriers in the state. See also OPINION, Docket No. P-1476, Sub 1, Certificate of Public Convenience and Necessity Authorizing the Provision of Intrastate Local Exchange and Exchange Access Telephone Service (May 18, 2009) and see OPINION, Docket No. P-1466, Sub 1, Certificate of Public Convenience and Necessity Authorizing the Provision of Intrastate Local Exchange and Exchange Access Telephone Service (Oct. 30, 2008) (both granting a certificates for telephone service in two sentence-long order without referring to a hearing or formal findings).

<sup>7</sup> See 2005 Al. Pub. Act 110 at SYNOPSIS (discussing State Communication Reform Act of 2005, codified at Title 37, Chapter 2A of Alabama statutes that is intended to "to limit the jurisdiction of the Public Service Commission over certain telecommunications services offered by local exchange carriers and intrastate inter-exchange carriers").



1     **III.     THE ECONOMICS OF CLEC ENTRY**

2     **Q.     What statements has Mr. Meredith made concerning the decisions faced by**  
3     **CLECs that are contemplating entry into rural markets?**

4     **A.**     Mr. Meredith makes several statements that characterize and disparage the  
5     CLECs as companies seeking to target only “profitable” customers. For example,  
6     he states that it would unduly favor the CLEC if it were permitted to “selectively  
7     market into a particular territory.”<sup>8</sup> He claims that “the predominant CLEC  
8     business model focuses on low cost, high volume services such as business  
9     service, high capacity private lines, and middle mile transport and backhaul.”<sup>9</sup> He  
10    claims that this entry strategy “directly affects the [incumbent local exchange  
11    carrier’s (“ILEC’s”)] rate of return and its ability to sustain its obligations as a  
12    carrier of last resort.”<sup>10</sup> He concludes, therefore, that the Commission should  
13    examine the potential impact on ILECs of this “historic” entry pattern, and  
14    possibly impose requirements on carriers or, I suppose, deny CLEC entry if the  
15    potential impact on ILECs is too severe.

16    **Q.     What business considerations affect how CLECs enter and market service in**  
17    **new geographic areas?**

18    **A.**     There are many different types of CLECs, each with its own business plans.  
19    Some CLECs match Mr. Meredith’s description of serving business customers.

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<sup>8</sup> Meredith PFT, at 16.

<sup>9</sup> Meredith PFT, at 17.

<sup>10</sup> Id.

1 But even within this group, some CLECs will concentrate on customers that can  
2 be served by their own facilities, while others will expand service to off-network  
3 customers using the ILECs' loop facilities to concentrate traffic at wire centers or  
4 other centralized locations. For example, segTEL, which is a party to this case,  
5 appears to provide service in other parts of New Hampshire using both strategies,  
6 by leasing unbundled elements from FairPoint and by building its own loop  
7 facilities.<sup>11</sup>

8 A second major category of new entrants into rural markets is the cable  
9 companies such as NECTA members, which provide service to residential  
10 customers and small to medium business customers to the vast majority of  
11 customers within their franchised footprint. Cable companies offer most services  
12 to customers using their existing "loop" facilities, which also provide video and  
13 data services.

14 There are many economic considerations that affect how CLECs will enter  
15 new markets. Cable companies will stick to the geographic areas in which they  
16 were granted video franchises. It would be impractical, and indeed economically  
17 unwise, for a cable company to enter the voice market by offering service on a  
18 widespread basis to large numbers of customers that are not passed by their  
19 existing plant. Similarly, a business-oriented CLEC with limited fiber optic  
20 facilities would be unable to serve significant numbers of residential customers,

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<sup>11</sup> RLECs-segTEL-1-1 through 1-3.

1 even in the geographic areas where it provides business service, without  
2 undermining its entire financial existence.

3 Mr. Meredith has invoked the traditional attack on new entrants by, in  
4 essence, accusing them of cream skimming. There is a long history of  
5 incumbents trying to prevent competition by attacking potential entrants (in long  
6 distance and local markets) as cream skimmers. But this argument has always  
7 missed the point that entrants are different from incumbents. They could not  
8 possibly enter all markets at once, and they should not be compelled or expected  
9 to do so. Moreover, the ILECs' claim, whenever they face new entry, that the  
10 "sky is falling" has proven to be false, time and time again. Rather, policymakers  
11 have modified regulations governing the ILECs and the mechanisms paying  
12 subsidies to ensure that all customers can receive service at reasonable rates,  
13 while enabling well-managed ILECs to flourish.

14 **Q. Mr. Meredith argues that the Commission should consider requiring that**  
15 **entrants be designated as Eligible Telecommunications Carriers ("ETCs") as**  
16 **a condition of entering rural markets. Do you agree with his**  
17 **recommendation?**

18 **A.** No. As I explained in the previous answer, I believe that CLECs should not be  
19 expected to provide service across the same exact footprint as the ILEC. This  
20 requirement could impose costs on the CLEC that would discourage entry into  
21 any portion of the ILEC's serving area and thereby deny competitive choice to

1 consumers in the portions of the ILEC serving area that the CLEC can serve  
2 profitably.

3 Although there is a statutory basis, Section 253(f), for a state to impose the  
4 ETC requirement, this requirement has only been imposed in a few instances.  
5 Moreover, in at least two states, Missouri and Pennsylvania, the initial state  
6 statute or PUC guidelines that require CLECs to obtain ETC status have since  
7 been rescinded or no longer apply. Interestingly, in the case of Alaska, the CLEC  
8 entrant was seeking to obtain ETC status as a condition of entry, while the  
9 incumbents were opposed to this requirement.<sup>12</sup>

10 Mr. Meredith's states that the "Commission would have to assess whether  
11 this requirement is necessary," and that this along with the "panoply of issues  
12 identified in the state statute would appear to require discovery, technical  
13 conferences, and hearings."<sup>13</sup> This is a disingenuous attempt to link the ability of  
14 the Commission to impose this rarely-used ETC requirement to the requirements  
15 in the New Hampshire statutes in terms of the entry barriers imposed on CLECs.  
16 There is no reason that the Commission has to undertake an analysis of the ETC  
17 issue. And to the extent it does so, there is no equivalence between how such an  
18 investigation would unfold, where there is no burden of proof assigned to any  
19 party, to the burden that the New Hampshire statutes would impose on CLEC  
20 applicants for authorization to operate in the State. The New Hampshire statutes

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<sup>12</sup>In the Matter of Application by GCI Communication Corporation, U-05-4; Order No. 6, Regulatory Commission of Alaska, February 2, 2006.

<sup>13</sup> Meredith PFT, at 18

1 present a clear-cut case of an unreasonable entry barrier that cannot be  
2 whitewashed by the ability of a state commission to consider imposing an ETC  
3 requirement on a CLEC.

4 The Commission is not required to impose an ETC requirement on the  
5 CLECs, and I recommend that it not pursue this path. However, the Commission  
6 has the authority to do so. In that event, it would have to investigate a number of  
7 related issues, such as the effect of CLEC eligibility for universal service funds on  
8 the level of competition in rural markets. Further, as I mentioned in my direct  
9 testimony, it would make no sense for the Commission to study the effects of  
10 competition on rural companies without considering the role of other competitive  
11 services, such as broadband or over the top VOIP (e.g. Vonage) that are not  
12 subject to its jurisdiction. To the extent the Commission deems it appropriate to  
13 consider imposing ETC status on CLECs, however, its analysis could and should  
14 take place in a dedicated investigation rather than in the context of an individual  
15 CLEC's application for operating authority.

16 **IV. IMPACT OF CLEC ENTRY ON THE RLECs' FINANCIAL CONDITION**

17 **Q. What position has Mr. Meredith taken in regard to the need to examine the**  
18 **effect of CLEC entry on the RLECs as part of the process of granting**  
19 **certification?**

20 **A. Mr. Meredith states that from a policy standpoint it is important to examine how**

1 CLEC entry would affect the ILEC's rate of return and its ability to sustain its  
2 obligations as the carrier of last resort. He also claims that the application of New  
3 Hampshire statutes to require a hearing on these issues, as reflected in the  
4 requirements in RSA 374:26 and 374:22-g, would be "congruent" with the items  
5 suggested by Section 253(b) of the Telecommunications Act.<sup>14</sup>

6 **Q. Has Mr. Meredith made a convincing case that it would be worthwhile and**  
7 **lawful to analyze the impact of CLEC entry on the RLEC's financial**  
8 **condition as part of the certification process?**

9 **A.** No. As I stated in my direct testimony, I am not an attorney and cannot render a  
10 legal opinion. However, under the plain language of 47 USC § 253(a) a statute or  
11 regulation is preempted when it ". . . may prohibit or have the effect of prohibiting  
12 the ability of any entity to provide any interstate or intrastate telecommunications  
13 service." (Emphasis added.) The hearing requirements and the focus on the  
14 impact of entry on the incumbents in RSA 374:26 and 374:22-g certainly run  
15 afoul of this provision. Moreover, I disagree completely with Mr. Meredith's  
16 argument about the policy implications of turning a CLEC application process  
17 into an analysis of the ILEC's finances. As I stated in my direct testimony, the  
18 complexity and burden of such an analysis would likely serve as a significant  
19 barrier to entry.

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<sup>14</sup> Meredith PFT, at 17.

1           Mr. Meredith proposes that a very complex set of policy issues be  
2 addressed (and supposedly resolved) in the context of each and every CLEC's  
3 application for certification to enter each RLEC's serving area. This is not a wise  
4 or productive use of Commission and CLEC resources. The operating  
5 environment of the RLECs is changing, but CLEC entry (and even more so, the  
6 entry of an individual CLEC) is only part of the reason for change. The RLECs  
7 are also affected by wireless carriers (that do not require a certificate from this  
8 commission), over-the-top voice-over-Internet protocol ("VoIP") providers such  
9 as Vonage and Skype, and other services that substitute for traditional telephone  
10 service. Some of these changes are beneficial to the RLECs, such as their own  
11 ability to earn revenue from data and video services. At the same time, the  
12 RLECs must adjust to competition of one form or another. This may require  
13 changes to the regulations and requirements imposed on the RLECs, and possibly  
14 to universal service programs. But this is a matter for rulemaking or RLEC  
15 requests for alternative regulation. It should not be an excuse to limit or cause  
16 substantial delay in the availability of customer options by obstructing the entry of  
17 a particular category of competitors.

18 **Q. Does this conclude your rebuttal testimony?**

19 **A. Yes.**