

**STATE OF NEW HAMPSHIRE**

**BEFORE THE**

**NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

**IR 20-110**

**NEW HAMPSHIRE INCUMBENT LOCAL EXCHANGE CARRIERS**

**Investigation into the Administration and Oversight  
of the Telecommunications Relay Service Fund**

**New Hampshire ILEC-ELCs' Statement of Legal Issues**

The ten New Hampshire incumbent local exchange carriers, all of which are now designated as excepted local exchange carriers (together, the “ILEC-ELECs”),<sup>1</sup> submit the following statement of issues they believe are relevant to the conduct and completion of this proceeding before the New Hampshire Public Utilities Commission (“PUC”).

In its Order of Notice, the PUC states that the present investigations raises “issues related to whether the [PUC] is the appropriate party to administer the TRS Fund and, if not, then what alternative administrator(s) would be appropriate; and issues relating to what legal authority is required to modify the existing TRS administration and oversight structure.”<sup>2</sup>

**1. Summary**

The ILEC-ELECs share the PUC’s goal of ensuring that easy access to the telecommunications system continues to be available to every Granite Stater without regard to physical ability. The PUC exercises clear regulatory authority and oversight of New

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<sup>1</sup> The ten New Hampshire ILEC-ELECs are: Bretton Woods Telephone Company, Inc., Consolidated Communications of Maine Company, Inc. d/b/a Consolidated Communications/MT, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE, Dunbarton Telephone Company, Inc., Granite State Telephone Inc. d/b/a Granite State Communications, Hollis Telephone Company, Inc. d/b/a TDS Telecom, Kearsarge Telephone Company d/b/a TDS Telecom, Merrimack County Telephone Company, d/b/a TDS-Telecom, Union Telephone Company, Inc. d/b/a TDS Telecom, and Wilton Telephone Company, Inc. d/b/a TDS Telecom.

<sup>2</sup> DT 20-110, Order of Notice (N.H. Pub. Utils. Comm’n, July 14, 2020), at 1-2.

Hampshire’s TRS Program under both federal and state law. The ILEC-ELECs agree that changes in New Hampshire’s regulatory framework weigh in favor of designating an experienced and qualified third-party administrator to administer the TRS Trust Fund. In the ILEC-ELCs’ view, the PUC should conduct a public process to identify and select a new Trust Administrator. Even with the designation of a new Trust Administrator, the PUC should continue to exercise ultimate oversight of the operation of the TRS Program in New Hampshire.

## 2. The PUC’s Legal Authority Over the TRS Program

In 1991, the Federal Communications Commission (“FCC”) responded to the enactment of the Americans With Disability Act of 1990 (“ADA”) by promulgating mandatory minimum standards that common carriers must follow to provide access to voice services for people with hearing or speech disabilities.<sup>3</sup> In adopting the term “Telecommunications Relay Services” (“TRS”) for these services, the FCC officially abandoned its earlier usage of the term “dual party relay service” (“DPRS”), which had previously described the type of service at issue.<sup>4</sup> The FCC’s rules established TRS requirements for common carriers with respect to both their interstate and intrastate voice services.<sup>5</sup>

Any state that wished to exercise jurisdiction over TRS could certify to the FCC that it had established a state program that adhered to the minimum TRS standards set by the FCC.<sup>6</sup> A state that made this certification would preserve some control over the source and nature of the funding that could be used to pay for TRS services and equipment in that state.<sup>7</sup>

In 1990, even before the FCC opened its own rulemaking proceeding, the New Hampshire PUC acted proactively to open a proceeding (Docket DE 90-225) under New

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<sup>3</sup> See *In the Matter of Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans with Disabilities Act of 1990*, CC Docket No. 90-51, Report and Order and Request for Comments (FCC 91-213, July 26, 1991), adopting 47 C.F.R. Part 64, Subpart F (“Telecommunications Relay Services and Related Customer Premises Equipment for Persons With Disabilities”).

<sup>4</sup> See Report & Order, f.n. 1.

<sup>5</sup> 47 C.F.R. § 64.602.

<sup>6</sup> See 47 C.F.R. § 64.606(a).

<sup>7</sup> This is very similar to the authority that state commissions have over pole attachments, in which the FCC exercises federal authority over pole attachments (47 U.S.C. § 224(b)) *unless* a state certifies that it has adopted rules regulating the rates, terms and conditions of pole attachments. 47 U.S.C. § 224(c)(2).

Hampshire law to establish a TRS program for the State.<sup>8</sup> The focus of the PUC proceeding was the qualification and selection of a company that would act as the sole TRS service provider and to which the State's common carriers would subscribe so as to allow their customers access to TRS services. In the Final Order, issued on September 10, 1991, the New Hampshire PUC designated United Telecom, Inc. d/b/a Sprint Services ("Sprint") to be the State's TRS Provider.<sup>9</sup> From the outset, Sprint has been and remains the sole TRS service provider in New Hampshire.

Also in the Final Order, the PUC approved a Stipulation entered into by the ILECs, the other parties in the Docket, and the Staff, to establish a cost recovery mechanism for TRS. The Stipulation provided, in relevant part:

3.0 Dual Party Relay Service Charge. The local exchange companies ("LECs") will collect on a monthly basis, the [TRS] charge per access line to be folded into basic exchange rates recognizing the fact that [TRS] expands the definition of basic exchange service. . . .

4.0 Payment of Relay Service Costs by LECS. Each month the relay service provider [i.e. Sprint] shall calculate the total relay service costs to be recovered from the LECs, based on the price per minute approved by the PUC in this proceeding and the minutes of use actually processed by the relay center. Each month the relay service provider shall render a bill to the fund administrator for the amount owed, including a statement showing how the amount was calculated. Any dispute over the calculation, billing, and payment of these amounts may be brought before the PUC.

5.0 Escrow of Dual Relay Service Charge. The LECs shall contract with an escrow agent, acceptable to all of the LECs and the Commission, to be known as the fund administrator. . . . The LECs shall remit to the fund administrator all funds received via the [TRS] Charge. The fund administrator shall pay, upon presentation, all bills submitted to it by the [TRS] Provider chosen by the Commission [i.e., Sprint] . . . . The fund administrator shall file an annual report with the Commission delineating: the funds received and the LEC specific source of the funds, the funds dispersed, accrued interest and administration costs. The LECs and the Commission shall have the right to audit the fund administrator . . . .

(Emphasis added.)

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<sup>8</sup> *Re: Dual Party Relay Services*, DE 90-225, Report (N.H. Pub. Utils. Comm'n, Mar 25, 1991), at 1.

<sup>9</sup> *In re: Dual Party Relay Service/Telecommunications Relay Service (TRS)*, Docket No. DE 90-225, Order No. 20,236 (N.H. PUC, Sept. 10, 1991).

The quoted sections of the Stipulation highlight the PUC’s authority in administering and overseeing the TRS Provider, the TRS Administrator, and the moneys collected and disbursed to fund the TRS Program in New Hampshire.

### 3. PUC Oversight of the TRS Trust Fund

To carry out their duties under the PUC’s Order, the then-ILECs established the TRS Trust Fund on January 28, 1992. A copy of the “Telephone Relay Service Trust Agreement” is attached here as **Exhibit ILECS-1** (the “Trust Agreement”). The Trust Agreement was entered into by the twelve (12) incumbent local exchange carriers then serving in New Hampshire, including New England Telephone Company, and by the ILECs’ chosen Trustee, First NH Investment Services Corporation, of Manchester, as fund administrator. (The Trustee and Fund Administrator of New Hampshire’s TRS Trust Fund is now Citizens Bank.)

The Trust Agreement makes clear that the ILECs were acting pursuant to the previously cited Order No 20,236, issued in DE 90-225 on September 10, 1991, and to the Stipulations approved by the PUC in that proceeding.<sup>10</sup> “The purpose of this trust is the implementation of [PUC] orders relating to the recovery by LECs of the costs of providing TRS in New Hampshire and the payment of charges of the TRS Provider for TRS.”<sup>11</sup> Particularly noteworthy is this provision of the Trust Agreement: “No distributions of investment income shall be made to the LECs.”<sup>12</sup> This makes clear that the LECs are not the financial beneficiaries of the Trust Fund.

With respect to PUC oversight of the TRS Trust Fund, the Trust Agreement provides that the Trustee must “provide to the [PUC] a monthly accounting which will include the amounts and dates of collections from the LECs, payments to the TRS Provider, fees and expenses of the trust, interest and investment income and the balance and investment status of funds not disbursed.”<sup>13</sup> In addition, the Trustee may not resign without first giving written notice to the

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<sup>10</sup> See Trust Agreement, at 1.

<sup>11</sup> *Id.*, ¶ 1, at 2.

<sup>12</sup> *Id.* ¶ 8, at 7.

<sup>13</sup> *Id.*, ¶ 6(b), at 5.

PUC, among others.<sup>14</sup> The ILECs may designate a successor Trustee, but any successor who wishes to charge fees more than 50% higher than those charged by the prior Trustee must obtain the prior approval of the PUC.<sup>15</sup> If the ILECs cannot agree on a successor Trustee, the PUC shall designate a successor Trustee who meets the qualifications established in the Trust Agreement.<sup>16</sup> The Trust may not be terminated without “an order by the [PUC] directing the termination of the Trust Agreement.”<sup>17</sup> Upon termination, “the funds and securities held under the trust created hereby shall be applied in the manner directed by the [PUC].”<sup>18</sup>

Importantly, the Trust Agreement further provides that

In the event the Commission (or successor agency of the State of New Hampshire) shall no longer have regulatory jurisdiction over TRS, this Trust Agreement may be terminated by LECs have a majority of access lines in New Hampshire, and, in such event, the funds remaining in the trust after the payment of invoices for TRS and any remaining taxes and fees and expenses of the Trustee shall be distributed to the LECs pro rata based on the percent which the number of access lines served by each LEC bears to the total number of access lines in New Hampshire.<sup>19</sup>

The foregoing provision makes clear the ILECs’ intention to make the PUC’s authority over the TRS Trust Fund *coextensive* with the PUC’s regulatory jurisdiction over TRS service itself. The PUC’s jurisdiction over TRS service and the TRS Trust Fund rest firmly on state law and on the PUC’s delegated authority under federal law.

#### **4. Delegation of Investment Authority over the TRS Trust Fund**

As the foregoing provisions demonstrate, the PUC exercises clear and valid legal authority over the TRS Trust Fund. Nonetheless, the Trust Agreement also gives investment authority for the TRS funds to the ILECs and the Trustee, not the PUC. The fact that important responsibilities are given to other parties or are shared between the PUC and other parties could create doubt as to the PUC’s overall responsibility for the TRS Trust Fund. In the ILEC-ELECs’ view, however,

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<sup>14</sup> *Id.*, ¶ 7, at 6.

<sup>15</sup> *Id.*, ¶ 7, at 6-7.

<sup>16</sup> *Id.*, ¶ 9, at 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

the powers exercised by the ILECs and the Trustee spring directly from the PUC's Order and would not exist but for the PUC's Order. These powers are also significantly limited by the terms of the Trust Agreement, and any operational decisions made by the ILECs and their appointed Trustee are ultimately reviewed by, and answerable to, the PUC. The fact that the PUC delegated the investment authority over the assets to the ILECs and their appointed Trustee does not negate or weaken the PUC's ultimate legal responsibility over the TRS Trust Fund.

The Trust Agreement establishes the mechanism for holding and investing funds generated through the TRS Program. But while Paragraph 5 of the Trust Agreement allows the Fund Administrator (acting as Trustee) to invest these funds, the Trust Agreement places significant limitations on the Trustee's discretion. The Trustee can invest TRS funds only in U.S. Government securities that "hav[e] no risk as to the payment of principal and interest" and that have maturity dates no later than the scheduled dates of distributions from the TRS Trust Fund.<sup>20</sup> If the funds are not invested in appropriate U.S. Government securities, they must be deposited in bank deposit accounts that are either fully insured by the F.D.I.C. or are "secured by a perfected first priority security interest in Permitted Government Securities."<sup>21</sup> As a practical matter, therefore, the Fund Administrator has virtually no discretion as to the investment of the TRS funds, and, as previously noted, must account to the Commission on a monthly basis regarding the nature of its investments and their performance.<sup>22</sup>

Similarly, the authority given to the ILECs to appoint the Trustee arises directly from the PUC's Order in Docket DE 90-225 and from the Stipulations approved by the PUC in that proceeding. The Trust Agreement makes clear that the Trust Fund is simply an instrument for carrying out the PUC's mandate. The ILECs have no inherent authority, but only delegated authority, under the Trust Agreement. The PUC has ultimate authority to review and approve the actions of the ILECs and the Trustee under the Trust Agreement.

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<sup>20</sup> Trust Agreement ¶ 5, at 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, ¶ 6(c), at 5.

## 5. Proceeding to Appoint a Successor Trust Administrator

The PUC has asked “what legal authority is required to modify the existing TRS administration and oversight structure.”<sup>23</sup> The ILEC-ELECs’ believe that the PUC’s legal authority over both the TRS Program and the TRS Trust Fund is clear. Because of the important federal and state policies of equity and access involved in New Hampshire’s TRS Program, the ILEC-ELECs believe that the process of designating a successor TRS Trust Administrator should be conducted by the PUC in an open, public and transparent proceeding under the present Docket. All stakeholders should have an opportunity to participate in the process, to express their views and assert their interests, and to ensure that any successor Trust Administrator has the experience and qualifications to administer the TRS Trust Fund.

Like the PUC, the ILEC-ELECs are mindful of the substantial deregulation of telecommunications services in recent years in New Hampshire.<sup>24</sup> These changes have led, among other things, to the ILECs being designated as “excepted local exchange carriers” under RSA 362:7, I(c)(2). The arrival of regulatory restructuring has meant a reduction in the personnel and resources that PUC has available for regulatory oversight of telecommunications services. The ILEC-ELECs agree that the time is right to appoint a successor Trust Administrator for New Hampshire’s TRS Trust Fund.

The ILEC-ELECs encourage the PUC desires to use this Docket to undertake a process for selecting and designating a third-party administrator to serve as the successor Trust Administrator. If the PUC undertakes such an effort, the ILEC-ELECs expect to participate fully in the proceeding and to work with Staff and all interested parties in determining the qualifications and other selection criteria that eligible candidates must meet to be designated as successor Trust Administrator.

The ILEC-ELECs thank the PUC for the opportunity to offer the foregoing statement.

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<sup>23</sup> IR 20-110, Order of Notice (July 14, 2020), at 1.

<sup>24</sup> See 2012 Senate Bill 48 (enacted as Chapter 177 of the 2012 Session Laws).