**STATE OF NEW HAMPSHIRE**
**PUBLIC UTILITIES COMMISSION**

**DT 10-183**

**RURAL TELEPHONE COMPANIES**

**CLEC Registrations within RLEC Exchanges**

**Order Denying Motion for Rehearing**

**O R D E R N O. 25,291**

**November 21, 2011**

## I. FACTUAL AND PROCEDURAL BACKGROUND

Following remand from the New Hampshire Supreme Court to determine if state law is preempted by federal law, *see Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 309 (2010) (*Union Telephone*), the Commission issued Order No. 25,277 (October 21, 2011) in this docket. The Order concluded, among other things, that the adjudicated hearing process required by RSA 374:26 and RSA 374:22-g for the purpose of authorizing the provision of telecommunications services by more than one provider in a franchise area is preempted by federal law, specifically section 253 of the Telecommunications Act of 1996 (the Act). *See* 47 U.S.C. § 253. The Commission found that, in the context of petitions from competitive local exchange carriers (CLECs) to enter the service territories of rural incumbent local exchange carriers, the adjudicated hearing required by RSA 374:26, combined with the public good determination, including consideration of various factors, required by RSA 374:22-g, II, could prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services in conflict with federal law. Based upon that finding, the Commission determined that State law was preempted. The Commission further

determined that it would undertake a rulemaking to address the areas of regulation reserved to the State in the federal law to see if any additional or modified requirements are necessary, and that until new or amended rules are adopted, the registration process set out in Puc 431 will apply to CLECs seeking entry into the service territories of rural incumbent carriers.

On November 3, 2011, four rural local exchange carriers, Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, and Granite State Telephone, Inc. (collectively the RLECs or Petitioners) moved for rehearing of Order No. 25,277 contending that the Commission erred in various respects in its preemption analysis. On November 10, 2011, the New England Cable and Telecommunications Association, Inc. (NECTA) emailed to the parties and staff an opposition to the RLECs' motion for rehearing that was filed in paper form at the Commission on November 14, 2011. segTEL, Inc. (segTEL) objected to the RLECs' motion in an email circulated to the parties and staff on November 14, 2011 and filed in paper form at the Commission on November 17, 2011.

## II. POSITIONS OF THE PARTIES

### A. RLECs

The RLECs first contend that the Commission misinterpreted the extent to which state law may be preempted by federal law. Specifically, they argue that when the Commission concluded, with regard to the list of items in RSA 374:22-g, that the preemption of one item would appear to lead to the preemption of the others, the Commission reached a conclusion that was "the opposite of settled law" and which violated the principle that a statute may be constitutional in part and unconstitutional in part. RLECs' Motion for Rehearing at 3. They contend, therefore, that the Commission was unreasonable in conducting "its analysis with the

belief that any defect in the state statute rendered it void in its entirety." RLECs' Motion for Rehearing at 4.

Next, the RLECs argue that the Commission ignored, "for all practical purposes," the portions of section 253 that permit the Commission to impose conditions on the entry of CLECs. RLECs' Motion for Rehearing at 4. They contend that the Commission did not recognize that the savings clauses of sections 253(b) and (f) give the Commission latitude to impose conditions on entry and that "it is reasonable to presume that the Commission would have to conduct a hearing on whether a potential entrant meets those conditions." RLECs' Motion for Rehearing at 4. More particularly, the RLECs contend that federal law allows for consideration of matters impacting universal service and carrier of last resort obligations, and that the Commission did not give appropriate attention to these factors and "presumed that Section 253 imposes an unconditional mandate for competitive entry." RLECs' Motion for Rehearing at 6.

The RLECs also argue that the Commission erred in its preemption analysis regarding each of the specific factors set out in RSA 374:22-g, II. First, with regard to the interests of competition, the RLECs contend that the Commission failed to understand the RLECs' contention that public policy favors competition as a public good, but only under certain conditions including preservation of universal service and carrier of last resort obligations, in a fair and balanced regulatory environment. The RLECs contend that the "regulatory scheme that the Commission established in the Order fails to meet these criteria." RLECs' Motion for Rehearing at 7.

The RLECs argue that the Commission's misinterpretation of the factor on competition is "best illustrated" in the holding that the state statute requires the consideration of the impact on

the incumbent from the presence of competition, which, they contend, is contrary to the words of the statute. RLECs' Motion for Rehearing at 7. They argue that the analysis under the statute should be with respect to competition as a whole and not with any special emphasis on the incumbent.

Next, as to the factors covering the incumbent's opportunity to earn a reasonable return and the incumbent's ability to recover expenses incurred to benefit competitors, the RLECs argue that the Commission erred by interpreting these factors as prohibiting financial harm to the incumbent. The RLECs then argue that "[h]aving adopted this interpretation, [the Commission] then posits an 'absurd' scenario in which adept competitors, who might take significant business away from the incumbent, would be barred from competing.'" RLECs' Motion for Rehearing at 8. The RLECs agree that such a result is also "at odds with reality." RLECs' Motion for Rehearing at 8. They argue that the more plausible scenario is that adept competitors would take the most profitable customers from the incumbent and in so doing would "cause the failure of universal service." RLECs' Motion for Rehearing at 8. According to the RLECs, the Commission's statement that financial harm to them could be addressed through a rate case is unsupported by the record and illogical, and overlooks that the RLECs would be unable to raise their rates and remain competitive. The RLECs frame the issue of rate of return as relating directly to their ability to meet carrier of last resort and universal service obligations and that such concerns are within the purview of the states pursuant to section 253(b). Therefore, they contend, the Commission should reconsider its ruling on these factors.

As to the factor calling for the Commission to consider "fairness" in the context of competitive entry, the RLECs contend that the analysis of this factor is not as complex as

presumed by the Commission and that the New Hampshire Supreme Court has already provided some guidance on the matter. The RLECs note that the Court echoed the standard articulated by the Federal Communications Commission (FCC) that the issue is whether a state law limits the ability of any competitor to compete in a fair and balanced legal and regulatory environment, and, they argue, that 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." RLECs' Motion for Rehearing at 10. The RLECs conclude by stating that "rather than examine 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." RLECs' Motion for Rehearing at 10.

As to the factors covering universal service and carrier of last resort, the RLECs argue that there is nothing in state law that requires those obligations to attach any particular carrier or carriers, but that the state law requires only that the Commission "consider the issue in light of its overall mission." RLECs' Motion for Rehearing at 11. The RLECs argue that when properly considered, universal service would be preserved in a manner that does not disadvantage any one competitor, but that "the Order does just that, imposing these obligations on only one carrier." RLECs' Motion for Rehearing at 11. Further, they contend, "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." RLECs' Motion for Rehearing at 11 (emphasis in original). The RLECs argue

that because the Commission has placed them at a competitive disadvantage in the way it addressed universal service, it ought to reconsider the prior order.

Lastly, the RLECs contend that the Commission's order is unlawful and unreasonable because it is not competitively neutral. The RLECs note that the Commission conceded it is permitted to impose conditions on entry under section 253(b) – but ignored the language of section 253(f) – and that any conditions must be competitively neutral. The RLECs then contend that although it set out the correct framework, the Commission misapplied it by "establishing a regulatory scheme that is not competitively neutral among the universe of players." RLECs' Motion for Rehearing at 12. Specifically, the RLECs contend that by allowing competitive entry to their territories on the same basis as competitive entry into the territory of non-rural incumbents, they have been "consigned" to "an unlevel [*sic*] playing field." RLECs' Motion for Rehearing at 12.

Further, they argue that the Commission erred in relying upon *Nevins v. N.H. Dep't of Resources and Economic Dev.*, 147 N.H. 484, 487 (2002), for the proposition that the Commission need not establish rules on entry at present in that RSA 374:22-g, I, on its face, allowed the Commission to permit entry. According to the RLECs, the statute does not demand unfettered market entry on its face and the conclusion that it does is an error that will have "devastating effects on the statutory factors of universal service and carrier of last resort obligations." RLECs' Motion for Rehearing at 13. Thus, they argue that by "allowing unconditional market entry before any rulemaking, the Commissions [*sic*] violates the principle of competitive neutrality on which the Order is based." RLECs' Motion for Rehearing at 13.

**B. NECTA**

NECTA argues that the RLECs' motion fails to provide good reason for rehearing but principally restates their argument that by failing to address universal service and other factors in RSA 374:22-g, the Commission relinquished its authority. NECTA argues that the RLECs' arguments are unpersuasive for two reasons. First, NECTA contends that "nearly all states have limited the CLEC entry process to ensure that a CLEC is qualified to operate in the state." Opposition of New England Cable and Telecommunications Association to Rural Telephone Companies' Motion for Rehearing (NECTA Opposition) at 3.

Second, NECTA contends that while the Commission has found that consideration of broader policy questions is preempted in the entry context, the Commission did not relinquish authority to address them and may still do so in the context of rulemaking, generic investigations or petitions seeking regulatory relief. According to NECTA, there are alternative forums for the RLECs to raise concerns about the policy matters they contend are at issue here. In particular, NECTA notes that the Commission has already stated it will begin a rulemaking to consider additional regulatory requirements as a result of its order and that appropriate changes can be raised in that forum. NECTA also notes that to the extent a particular RLEC is concerned by competitive entry it can petition the Commission for specific relief or for alternative regulation pursuant to RSA 374:3-b.

NECTA further says that in arguing for rehearing on the specific factors in the statute, the RLECs ignore or underplay the burdens on potential entrants from being required to litigate each of those factors. NECTA also contends that such arguments ignore the Commission's ability to address the relevant policy concerns in other ways.

Concerning the RLECs argument that potential entrants to a market will "cherry pick" particularly attractive customers, thus imperiling universal service, NECTA contends that the RLECs have already made this argument and their renewed argument is insufficient to merit rehearing. NECTA further argues that the RLECs' portrayal of unfairness ignores the advantages that they receive as incumbent carriers, including access to federal universal service funds and "the advantage of ubiquitous, in-place networks, whose value has mostly been paid for already by the ratepayer." NECTA Opposition at 5. Lastly, NECTA contends that there are no "fundamental" differences between the RLECs and incumbents in non-rural territories from the threat of "cherry picking" and that a stated objective of the just announced decision of the FCC on the reform of universal service is to target subsidies to the high-cost areas of all incumbent carriers.[1]

In concluding, NECTA contends that the RLECs ignore the Commission's plan to begin a rulemaking to consider possible regulatory changes and they fail to explain why their concerns should not be addressed separately, "rather than in a piecemeal, duplicative, and costly fashion at the entry point for each and every CLEC." NECTA Opposition at 6.

**C. segTEL**

segTEL contends that the RLECs have not met their burden of proof to obtain rehearing. According to segTEL, the RLECs are attempting to re-litigate the docket in the hope of producing a result they would prefer by positing different analyses of the factors under RSA 374:22-g. segTEL argues that the Commission's order is not unlawful or unreasonable because there were other possible outcomes or "alternative orders that would have better suited the RLEC's interests." segTEL, Inc. Objection to Motion for Rehearing at 3.

[1] Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, __ F.C.C.R. __, (Nov. 18, 2011).

In addition, segTEl contends that the RLECs have not shown how the state statutes at issue satisfy the competitively neutral criterion of section 253(b) of the Act. segTEL contends that the RLECs have asserted that the Commission's order is competitively biased because the order both fails to read section 253 as protecting incumbents from discriminatory treatment and favors CLEC entry at the expense of the incumbents. According to segTEL, no reading of section 253, however, "can be parlayed into a conclusion that its ultimate purpose is to protect ILECs from market entrance through the erection of market barriers." segTEL, Inc. Objection to Motion for Rehearing at 3.

Lastly, segTEL contends that the RLECs claims of unfair treatment due to their heavier degree of regulation is unavailing because the Act provides for many regulations and obligations on incumbents that do not apply to competitors. According to segTEl, no incumbent carrier has ever prevailed by claiming such obligations are illegal on the basis of competitive neutrality. For these reasons, segTEL contends that the RLECs' motion should be denied.

## III. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14. A successful motion for rehearing does

not merely reassert prior arguments and request a different outcome. *See Comcast Phone of New Hampshire*, Order No. 24,958 (Apr. 21, 2009) at 6-7, and *Public Service Company of New Hampshire*, Order No. 25,168 (Nov. 12, 2010) at 10.

Initially, with respect to the RLECs various arguments that the Commission has abdicated its authority, or attempted to establish a new scheme for competitive entry, we do not agree. This matter was remanded to the Commission for the purpose of determining whether State law conflicted with federal law. The Commission determined that there was a conflict and, therefore, the State law could not stand. The Commission established only an interim process to address potential requests for entry until new rules could be adopted that conform to the requirements of federal law.

The RLECs' argument that the Commission erred in concluding that the preemption of one factor required the preemption of all misreads the Commission's order. First, the order states that the preemption of one factor would *appear* to impact the others, not that complete preemption was required by the preemption of one factor. *Rural Telephone Companies*, Order No. 25,277 (Oct. 21, 2011) at 30. Further, immediately following this conclusion, the order states that even if the preemption of one factor does not impact all, each of the factors individually are preempted. *Id.* As a result we find no basis to conclude that the order erred with respect to the scope of the preemption determination.

Next, we note that many of the RLECs' arguments focus on the reservations of authority to the states in sections 253(b) and (f) and their contention that those subsections permit the imposition of conditions on entry. According to the RLECs, the Commission erred in failing to give due consideration to those reservations of authority. As to the arguments regarding

subsection 253(b), which permits the state to impose, on a competitively neutral basis and consistent with section 254 of the Act, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure continued quality of telecommunications, and safeguard the rights of consumers, the Commission did not ignore or abandon the principles articulated in the Act or in RSA 374:22-g as a whole. Rather we found that the imposition of those requirements allowed by federal law, on a competitively neutral basis, must be done through rulemaking pursuant to RSA 374:22-g, III and RSA 541-A, rather than case by case adjudications that allow for denial of market entry and stated:

> Accordingly, we will 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. Included in this rulemaking will be consideration of other changes to our rules necessary to ensure that the rules comport with the findings in this order and are otherwise appropriate for the registration of competitive telecommunications providers.

*Id.* at 36. The Commission already has extensive administrative rules of general applicability that address each of these public good concerns and in light of the concerns of the RLECs and our decision in this case, we will examine the need for additions or modifications to those rules, including public hearings on any proposed rules. It is through such administrative rules that preconditions to market entry, consistent with state and federal law, may be appropriately imposed on a competitively neutral basis. Accordingly, we did not ignore the authority reserved to the State and do not consider this argument to be a basis for rehearing.

The RLECs also contend that the Commission ignored the reservation of authority in section 253(f) that specifically allows states to impose a particular precondition for market entry

in specific service areas of rural telephone companies. That provision is inapplicable in this instance :

> 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) of this title 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) of this title that effectively prevents a competitor from meeting the requirements of section 214 (e)(1) of this title; and
>
> (2) to a provider of commercial mobile services.

47 U.S.C. § 253(f). By its terms, this subsection allows the State to condition a competitor's entry into a rural service area on the competitor being designated an eligible telecommunications carrier, which carries certain universal service obligations. Such a precondition to market entry, which would not necessarily be of general applicability, would appear to be appropriate for case by case adjudication, at least with regard to specific RLEC franchise territories or service areas. The subsection, however, does not apply to service areas served by rural telephone companies that have an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1). Section 251(c) is the provision of the Act imposing certain obligations on incumbent carriers including the obligations to offer to competitors the ability to purchase, at a wholesale discount, any services the incumbent offers at retail and not to impose discriminatory conditions on the resale of those services. *See* 47 U.S.C. § 251(c)(4). Pursuant to section 251(f), certain rural incumbent carriers are exempt from this requirement until that exemption is lifted pursuant to a process set out in the Act. The RLECs here are all exempt. Thus, each of these companies

possess an exemption of section 251(c)(4), which renders section 253(f) inapplicable as to them. Thus this savings clause allowing imposition of a precondition to market entry is not applicable. As a result, we do not find that the RLECs' reference to that section provides a basis for rehearing.

The RLECs' arguments on each of the individual factors, also do not provide "good cause" for rehearing. In substantial part the RLECs' arguments are restatements of arguments previously made. For example, with respect to rate of return, the RLECs' contention that allowing an adept competitor to enter could jeopardize an RLEC's finances and its ability to provide universal service, is a restatement of the prior arguments that their financial condition is a relevant consideration when determining competitive entry – a position that we rejected.

At no point do the RLECs state an argument that convinces us that a case-by-case, territory-by-territory, competitor-by-competitor analysis of the impact on an RLEC, or on competition generally, from the presence of a *new* competitor can yield results that would be consistent with the federal law. Further, to the extent that the RLECs' ability to meet their service obligations may be imperiled by the presence of competition, as noted by NECTA, the RLECs have other avenues for pursuing relief. The RLECs may voice their concerns in the Commission's rulemaking process; petition for specific relief from the Commission, including through rate relief; seek alternative regulation pursuant to RSA 374:3-b; seek new legislative measures, including amending RSA 374:22-p to allow for a state universal service fund; or seek relief at the federal level, including through enhanced or more relevant federal funding. Congress has declared its support for competitive markets, as has the New Hampshire

legislature, and there is nothing in the RLECs' arguments that convinces us that the preemption determination we have made overlooked or misconstrued the relevant law.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the RLECs' motion for rehearing is DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of November, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director